

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products )  
Liability Litigation, ) MD 15-02641-PHX-DGC  
 )  
 )  
 )  
Lisa Hyde and Mark Hyde, a married ) Phoenix, Arizona  
couple, ) September 6, 2018  
 )  
 )  
Plaintiffs, )  
 )  
 )  
v. ) CV 16-00893-PHX-DGC  
 )  
 )  
C.R. Bard, Inc., a New Jersey )  
corporation, and Bard Peripheral )  
Vascular, an Arizona corporation, )  
 )  
 )  
Defendants. )  
 )

BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FINAL PRETRIAL CONFERENCE

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**P R O C E E D I N G S**

THE COURTROOM DEPUTY: MDL 2015-2641, in the matter of Bard IVC Filters Product Liability Litigation, on for final pretrial conference in the Hyde trial.

Will the parties please announce.

MR. O'CONNOR: Good morning, Your Honor. Mark O'Connor, co-lead attorney for plaintiffs.

MS. REED ZAIC: Julia Reed Zaic, plaintiffs' executive committee.

MR. LOPEZ: Good morning, Your Honor. Ramon Lopez, co-lead and attorney for the Hydes, plaintiffs Hydes.

MR. GOLDENBERG: Stuart Goldenberg, Your Honor, for the Plaintiffs' Steering Committee.

MS. SMITH: Laura Smith.

MR. NORTH: Good morning, Your Honor. Richard North on behalf of the defendants, and I am joined by James Rogers, James Condo, Elizabeth Helm, and Matthew Lerner.

And, Your Honor, I also want to alert the Court that Mr. Rogers will be taking the lead today because he's going to be the lead trial counsel in the Hyde case.

THE COURT: Okay.

Good morning, everybody. Welcome back. Hope you all had a nice summer.

The first thing I would like to do is deal with the

10:01:49 1 juror issues. I've issued two orders excluding folks for  
2 hardship. Those are dockets 12113 and 12375. Those excuse a  
3 total of 85 jurors for hardship.

4 Does either side have an objection to any of those  
10:02:08 5 excusals?

6 MR. O'CONNOR: No objection from the plaintiffs.

7 MR. ROGERS: None, Your Honor, from the defendant.

8 THE COURT: Okay, then we will excuse the 85 jurors  
9 listed in those two dockets.

10:02:21 10 In addition, as I think you learned yesterday, we  
11 have received a few additional jury questionnaires. By my  
12 count, looks like there are six that came in. I reviewed  
13 those and concluded that I should excuse Juror 19 and Juror  
14 175.

10:02:46 15 Any objection to excusing those two?

16 MR. ROGERS: None from the defendant, Your Honor. I  
17 do note what we received -- we didn't get a 175. We got a  
18 179.

19 THE COURT: Oh, you're right. It's 179.

10:02:59 20 MR. O'CONNOR: I apologize, Your Honor, I did not see  
21 that come through yesterday and I don't know anybody in my  
22 office saw it to go through it --

23 THE COURT: It was e-mailed to you about 9:30  
24 yesterday morning.

10:03:19 25 Look, if you would --

10:03:20 1 MR. O'CONNOR: I'm not going to object to hardships.

2 THE COURT: Okay. Both of them on page 2 of their  
3 questionnaires say they would face a hardship for various  
4 reasons.

10:03:29 5 So I take it there's no objection on those?

6 MR. O'CONNOR: No objection.

7 THE COURT: Okay. But we have, then, four others  
8 that are in the group. They are jurors 21, 35, 42, and 144.  
9 And you haven't seen copies of their questionnaires,

10:03:49 10 Mr. O'Connor?

11 MR. O'CONNOR: No, but I don't think that has to  
12 delay what we're going to do. If we could hold those off to  
13 the end, give me an opportunity to look at those, I would  
14 appreciate that, Your Honor.

10:04:00 15 THE COURT: Yeah, that's fine.

16 And you can actually look at our copies, if you want,  
17 and see if you have any concerns about them.

18 Okay.

19 (The Court and the courtroom deputy confer.)

10:04:17 20 THE COURT: Okay. So the next question, then, is  
21 whether you have challenges for cause based on the  
22 questionnaire answers. Why don't we start with plaintiffs and  
23 get your challenges for cause based on the questionnaires.

24 MR. O'CONNOR: Yes. We have a number of them, Your  
10:04:36 25 Honor. Would you like me to go through them?

10:04:39 1 THE COURT: Yeah. After I wipe all the water I just  
2 spilled on my iPad.

3 Okay. Go ahead, Mr. O'Connor.

4 MR. O'CONNOR: Your Honor, do you mind if I remain  
10:04:53 5 seated for my --

6 THE COURT: I do not. That's fine.

7 MR. O'CONNOR: First of all, one thing we noted in  
8 going through it, it looked as though number 2 may have a  
9 hardship. He had indicated that he would be missing classes  
10:05:07 10 that seemed to be going on at the same time, and I think he  
11 answered that all the way at the end.

12 THE COURT: He said in response to question number 1  
13 that jury service would not create a hardship for him.

14 MR. O'CONNOR: I was looking at question 64.

10:05:30 15 THE COURT: Yeah, I see that.

16 I don't see where he says anything else in his  
17 questionnaire about those college classes.

18 MR. O'CONNOR: He said, "If selected, I would be  
19 unable to attend college classes this semester."

10:06:07 20 I just wanted to bring that to the Court's attention.  
21 We may be dealing with that when he shows up here live.

22 THE COURT: Do you see anything else in his  
23 questionnaire about --

24 MR. O'CONNOR: Nothing else.

10:06:17 25 THE COURT: -- what college he attends?

10:06:19 1 MR. O'CONNOR: There was nothing else.

2 THE COURT: Looks like he says he's attended some  
3 classes in fire science.

4 I think we ought to ask him. I don't know if he's  
10:06:29 5 saying he's contemplating possibly attending college classes  
6 and it won't, or if he's actually enrolled and it will create  
7 a problem.

8 So thanks for pointing that out, but I think we ought  
9 to raise that with him when he comes.

10:06:41 10 MR. O'CONNOR: And the other preliminary issue is  
11 Juror Number 9. He indicated that his mother works at  
12 Gallagher and Kennedy. I have no idea who that is. But I  
13 believe Juror 9 had indicated some knowledge of the IVC  
14 litigation and apparently it's through his mother working at  
10:07:00 15 the firm. We have no idea who his mother would be.

16 MR. ROGERS: Your Honor, I believe he addresses those  
17 in question 63 and 40, if that would help you.

18 THE COURT: Yeah, he says his mother works there. He  
19 knows that the firm represents such cases. That seems to me  
10:07:30 20 to be a relatively close connection, even though we don't know  
21 who the individual is.

22 What are your thoughts on it, Mr. O'Connor?

23 MR. O'CONNOR: Well, I brought it to the Court's and  
24 counsel's attention. I didn't go to human resources and find  
10:07:47 25 out. I don't know anybody with that last name. But I don't

1 think we would have any objection to this one being excused.

2 THE COURT: Mr. Rogers.

3 MR. ROGERS: We agree, Your Honor.

4 THE COURT: Do you think he should be excused?

5 MR. ROGERS: Yes.

6 THE COURT: All right. I think he should as well.

7 It may be it's an attenuated connection, but when somebody  
8 actually works for one of the firms involved in the case, I  
9 think that's a close enough connection that I should grant the  
10 challenge for cause. So I will excuse Juror 9 for cause.

11 MR. O'CONNOR: Beginning with cause, Juror Number 16,  
12 Your Honor. And the questions that are concerning where it  
13 appears this juror definitely would have a predisposition  
14 against the plaintiff begin at 36. And I think if you look at  
15 the other answers in conjunction with each other, she supports  
16 tort reform at number 59 and made it a point that the reason  
17 she thinks it's necessary is because there's frivolous  
18 lawsuits and greedy plaintiff's attorneys.

19 So based upon that, we believe that this juror  
20 clearly has indicated in writing that she would have a  
21 predisposition against our side, one that's obviously formed  
22 before she even got here to this courtroom, so we would move  
23 to have her struck for cause.

24 MR. ROGERS: Your Honor, we disagree. This juror was  
25 given the opportunity to answer four questions about whether



10:09:32 1 she would be biased or whether she thought she might not be  
2 able to be impartial, and those were questions 39, 44, 62, and  
3 63. And of all those responses she indicated each time she  
4 does not note a reason why she could not be unbiased.

10:09:49 5 She also answered question 59, which is the question  
6 that asks if she had any strong feelings about people that  
7 bring lawsuits, and she said no.

8 So I think there's enough balance there, Your Honor,  
9 that she should not be struck for cause.

10:10:07 10 THE COURT: I think this juror requires additional  
11 questioning, so I'm not going to grant the challenge for cause  
12 at this time. But you certainly can inquire on those matters  
13 during voir dire.

14 MR. O'CONNOR: The next one we have is number 40,  
10:10:26 15 Your Honor. Apparently he is a medical doctor who uses IVC  
16 filters. He appears to be an equal opportunity disliker. He  
17 doesn't like us and he doesn't like them.

18 He has a personal bias against IVCs but he also  
19 indicates in 63 straight out that he cannot be fair. So we'd  
10:10:51 20 move for cause on number 40.

21 MR. ROGERS: We agree, Your Honor.

22 THE COURT: I agree as well. He clearly indicates  
23 that his views would affect his ruling in the case. So I'm  
24 going to grant the challenge for cause to Juror 40.

10:11:13 25 MR. O'CONNOR: Your Honor, I apologize I didn't bring

10:11:15 1 this one up earlier. 49 indicated at question 64 that he is  
2 set to go to the Bahamas during this trial. I think 64 is  
3 where I saw it.

4 THE COURT: You're right. He does. Doesn't say it  
10:11:39 5 on question 1.

6 MR. ROGERS: We agree, Your Honor. I had him flagged  
7 as well as somebody who would be extremely unhappy if he had  
8 to be here.

9 THE COURT: All right. I will excuse Juror -- I will  
10:11:50 10 grant the challenge for cause to Juror 49 because of his  
11 unavailability.

12 MR. O'CONNOR: Our next cause is number 50, Your  
13 Honor. Question 49. He says he has strong negative feelings  
14 about people who file lawsuits and he thinks most lawsuits are  
10:12:10 15 against big corporations and people with a lot of money and  
16 the reason they're brought is for money.

17 He doesn't feel that the system should be used for  
18 retirement. His answer to question 59.

19 And, again, I think when a person writes these kinds  
10:12:26 20 of answers in response to these questions, it -- it's a clear  
21 indication that he is starting out with a bias and is alerting  
22 us that these are formed, and I think that there's no reason  
23 to question him any more, that on the face, this juror has let  
24 us know he's starting out with a clear predisposition against  
10:12:48 25 plaintiffs and lawsuits.

10:12:53 1 MR. ROGERS: Your Honor, we disagree. Again, I think  
2 this is similar to Juror 16. This juror responded in response  
3 to at least three questions that, when he was asked if he  
4 could be impartial or not biased, he indicated that he could.  
10:13:06 5 And those are the responses to 63, 39, and 44.

6 THE COURT: Like the previous juror, I think we need  
7 to ask some additional questions of this juror, so I'm going  
8 to deny the challenge for cause at this time, subject to  
9 further questions of him.

10:13:26 10 MR. O'CONNOR: That was number 50; correct?

11 THE COURT: Right.

12 MR. O'CONNOR: Number 52 is a veterinarian. He  
13 responded, I thought it was -- let me find it. That he --  
14 that just knowing about the lawsuit would affect his ability  
10:13:44 15 to be fair and impartial. And then at question 44 -- let me  
16 find the answer. Apologize.

17 He says he feels there are a lot of frivolous  
18 lawsuits against the medical community.

19 So, again, based upon what he has clearly indicated,  
10:14:17 20 we believe this witness has demonstrated to us and wants us to  
21 know that he is starting without with a predisposition against  
22 us and the system in general.

23 THE COURT: Hold on just a minute, Mr. Rogers.

24 Traci, is that beeping coming from our equipment  
10:14:36 25 room?

10:14:38 1 THE COURTROOM DEPUTY: Yes. I've e-mailed and I'm  
2 trying to get it stopped.

3 THE COURT: Mr. Rogers.

4 MR. ROGERS: I think he falls in line with Jurors 16  
10:14:45 5 and 50. He indicated in response to, again, at least three  
6 questions when asked about -- if he could be impartial, and he  
7 didn't see any reason why he could not. Those are responses  
8 39, 62, and 63.

9 THE COURT: I think this juror requires additional  
10:15:08 10 questions as well, so I'm going to deny the challenge for  
11 cause at this time.

12 MR. O'CONNOR: All right. The next one we are moving  
13 on, Your Honor, is number 61.

14 Clearly this juror is starting out on a scale showing  
10:15:31 15 her imbalance of partiality. She gave personal injury lawyers  
16 a 1 and medical device companies a 7. More importantly, she  
17 says in 63 she works for a disability insurance company and  
18 therefore she cannot be fair and impartial. And so for that  
19 reason, we believe that this juror should be excused.

10:15:53 20 The question is, "Do you know of any reason you could  
21 not be fair and impartial, unbiased, during this lawsuit?"

22 She answered, "Yes, I work in disability insurance as  
23 stated previously."

24 MR. ROGERS: Your Honor, I think we agree on this  
10:16:10 25 one.

10:16:16 1 MR. O'CONNOR: I thought you would. I read 38, too.

2 THE COURT: I am going to grant the challenge for  
3 cause. There's a number of comments in this questionnaire --

4 MR. O'CONNOR: That's number 61?

10:17:14 5 THE COURT: -- where the juror indicates that she  
6 could not be fair or says in other situations she would have  
7 conscious or subconscious bias. So I will grant the challenge  
8 for cause to Juror 61.

9 MR. O'CONNOR: Thank you.

10:17:31 10 Next on our list is number 66. 44 -- in answer to  
11 question 44 he said he cannot be -- well, indicated he cannot  
12 be fair and impartial. He has an utter distaste for PI  
13 lawyers who have damaged America and its healthcare system.  
14 Later on he says that he is blaming lawyers for his need to go  
10:17:54 15 out of country for care, I think.

16 But 49 he says that he has mostly strong feelings  
17 about people who file -- negative feelings about people who  
18 file lawsuits.

19 59, he believes that legislative reform is necessary  
10:18:12 20 because lawsuits are damaging America and affecting his  
21 ability to get health care.

22 And then in number 63 he says he cannot be fair and  
23 impartial. He has honest dislikes and opinions as explained.  
24 "I can't imagine that others honestly do not."

10:18:35 25 So clearly we believe that this juror should be

1 removed for cause.

2 MR. ROGERS: Your Honor, we agree, or have no  
3 objection. This juror's obviously got extreme feelings about  
4 the American healthcare system and we agree he should be gone  
5 for cause.

6 THE COURT: I'm going to grant the challenge for  
7 cause to Juror 66.

8 MR. O'CONNOR: Next is Juror 78.

9 At question 44 this juror indicated she does not want  
10 to be on jury service.

11 At 49 she said she has strong negative feelings about  
12 people filing lawsuits. She says they're cluttering up our  
13 court system.

14 And at 59 she wants legislative reforms and she said  
15 because she wants doctors to come here and practice and  
16 therefore she needs caps in malpractice.

17 There, again, Your Honor, when you combine a juror  
18 who is telling us she does not want to be here and she's  
19 already indicating her strong feelings that were obviously  
20 formed long before she got this questionnaire, we believe this  
21 juror -- we should not have to go to the task of questioning  
22 this juror in front of others.

23 78, Jim.

24 MR. ROGERS: Your Honor, the juror does indicate  
25 several times she could be impartial or certainly doesn't know

10:20:17 1 any reason why she can't be impartial.

2 I don't have strong feelings about her, though. If  
3 Mr. O'Connor wants her gone, I'm glad to agree with him.

4 THE COURT: Well, I'm going to grant the challenge  
10:20:27 5 for cause to Juror 78. I think the questionnaire clearly  
6 indicates she wouldn't want to be here and wouldn't be fair.

7 MR. O'CONNOR: Your Honor, I have an unusual note  
8 here. 107. I couldn't understand it, but in qualifying his  
9 answer to number 64 he says, "As a prospective juror, a  
10:20:55 10 personal challenge I will face will be" -- I wanted to bring  
11 this to the Court's attention. It appeared he was trying to  
12 state a hardship, but to be perfectly honest, we had  
13 difficulty reading this one.

14 THE COURT: I think he says "As a prospective juror,  
10:21:21 15 a personal challenge I would face will be going from being  
16 on-the-go type individual to a slow-paced sitting type of  
17 environment individual for eight hours a day." And then I  
18 can't read the words in between, but says "even the length of  
19 the trial may be days/weeks."

10:22:06 20 I think that's what he's saying. He'll be sedentary  
21 for eight hours a day. Which we all know is true.

22 MR. ROGERS: I took it to mean, Your Honor, he just  
23 didn't feel like sitting through this trial. Other than that,  
24 he didn't have any indicators of bias either way.

10:22:22 25 MR. O'CONNOR: One issue with this juror though, and

1 I notice this with a couple others, but he specifically would  
2 not answer questions that I think are important questions  
3 about medical history related to him and his family. And  
4 obviously that's going to have to be a question both sides are  
5 going to need answers to when he comes here.

6 THE COURT: I agree. But I think we need to ask him  
7 those questions.

8 MR. O'CONNOR: All right.

9 Next we have on our list, Your Honor, is number 146.  
10 And starting with question 44. He believes that lawsuits are  
11 harmful to all. And that's based upon a personal experience  
12 he had.

13 49, he has strong negative feelings about people who  
14 file lawsuits.

15 He thinks a number of lawsuits are too high and  
16 verdicts are too high. That's in response to 57 and 58.

17 In 59 he believes that legislative reform is  
18 necessary and then -- let me make sure I have this right.

19 At 62 he says, "Since I have been personally sued, I  
20 believe lawsuits should not take place without new laws."

21 Here, again, Your Honor, this juror is clearly  
22 telling us that he is starting out with a bias against people  
23 who file lawsuits and against the system in general. He even  
24 has suggested that he thinks -- he has implied that he doesn't  
25 believe in the laws today because he thinks there's new laws.



10:24:47 1 And here again, in the written word he has  
2 demonstrated a predisposition obviously formed long before he  
3 even got this questionnaire showing that he has  
4 predisposition. And our position is we should not be forced  
10:25:01 5 to question this witness -- juror in front of others and he  
6 should be excused for cause here on the face of his  
7 questionnaire.

8 MR. ROGERS: We agree, Your Honor.

9 THE COURT: This juror notes that he has a number of  
10 family members who work in healthcare and he works for a  
11 pharmacy benefits company, that a previous lawsuit nearly  
12 bankrupted his family. Sounds pretty personal. So I agree.  
13 I'm going to grant the challenge for cause to Juror 146.

14 MR. O'CONNOR: So next, Your Honor -- I'm getting  
10:25:56 15 close to the end here -- number 152.

16 Your Honor, I'll withdraw that. I'm not going to  
17 make a record on him.

18 THE COURT: All right.

19 MR. O'CONNOR: The next juror that we are moving on  
10:26:45 20 is Juror 159.

21 Starting with his response to 49 where he talks about  
22 frivolous lawsuits and then going down to -- I apologize, Your  
23 Honor, I have my wrong notes.

24 Number 172.

10:27:48 25 I'll withdraw my position on number 159.

10:27:52 1 THE COURT: Okay.

2 MR. O'CONNOR: In response to question 44, the  
3 question is, "Is there anything else that might affect your  
4 ability to be fair and impartial? And he answers yes and goes  
10:28:23 5 on to talk about his experience with personal injury lawyers  
6 and the claims industry he would not be -- he would not likely  
7 be impartial.

8 And then he has responded that he thinks that the  
9 number of lawsuits are too high and money damages are too  
10:28:57 10 high.

11 But the point to us, Your Honor, is in a question  
12 that directly asks about being fair and impartial he says no,  
13 he does not believe he could be.

14 THE COURT: Which question are you referring to?

10:29:17 15 MR. O'CONNOR: Number 44.

16 THE COURT: All right.

17 Mr. Rogers.

18 MR. ROGERS: Your Honor, this juror indicates he  
19 works in the auto claims area, and so I think that's probably  
10:29:37 20 what he's talking about.

21 Mr. O'Connor's certainly correct, in response to  
22 question 44 he did say that he had an experience with personal  
23 injury lawyers that may lead him not to be impartial. But in  
24 regard to several other questions, he indicated he knew of no  
10:29:54 25 reason why he could not be unbiased, and those are questions

10:29:58 1 39, 62, and 63. And 39 is the question that specifically asks  
2 him if he has any issues that would lead him to be unbiased in  
3 a case regarding a medical product and he said he could be  
4 unbiased.

10:30:17 5 THE COURT: He says in response to question 44 that  
6 he likely could not be impartial based on his experience in  
7 the claims industry with personal lawyers. It does appear  
8 it's auto claims he's been involved with.

9 I think we need to ask this juror more questions to  
10:30:37 10 determine whether that would affect this case, so I'm going to  
11 deny the challenge for cause to Juror 172.

12 MR. O'CONNOR: With the exception of the ones that I  
13 was provided here today, Your Honor, that's all of the cause  
14 motions we have. I'll just need some time to go through  
10:30:59 15 these.

16 THE COURT: That's fine. If you would, be sure you  
17 get that back to us because that's our only copy of those  
18 questionnaires.

19 MR. O'CONNOR: Right. Will there be five minutes at  
10:31:09 20 the end where I get to look at these and go through them?

21 THE COURT: Sure. You can just do it during a break  
22 in the morning and remind me to come back to that at the end.

23 Mr. Rogers.

24 MR. ROGERS: Yes, Your Honor.

10:31:19 25 Our first strike for cause is Juror Number 59. And

10:31:25 1 this gentleman is probably a little bit of the same category  
2 of the juror we just went over who had a negative experience  
3 being sued in a lawsuit.

4 But this individual indicates that he and his family  
10:31:40 5 brought a wrongful death action in regard to his sister's  
6 death and he indicates in response to question 62 and 63 that  
7 in his opinion and my family's opinion the doctor's poor  
8 standard of care caused his sister's death and that may  
9 possibly influence his ability to apply the law, was the  
10:32:03 10 specific term he used. So we believe he should be struck for  
11 cause, Your Honor.

12 THE COURT: Mr. O'Connor.

13 MR. O'CONNOR: Well, he qualified it like the last  
14 one we talked about. And we're not here for any type of  
10:32:15 15 medical malpractice or wrongful death lawsuit. So given that,  
16 I think that both parties should be afforded to talk to this  
17 juror about his experience and then have an understanding how  
18 he would respond to the issues that are present in this case,  
19 not in a medical case. Well, not a medical malpractice case.

10:32:40 20 THE COURT: In response to question 62 he says, "It  
21 is possible this might influence my fairness," and 63 he says,  
22 "I am concerned this could influence me."

23 I think we need to ask him more questions. So I'm  
24 going to deny the challenge for cause to Juror 59.

10:32:56 25 MR. ROGERS: Your Honor, our next strike for cause is

10:33:01 1 Juror Number 63. And this juror indicates several times that  
2 he is biased against IVC filters. He works in the healthcare  
3 industry. It's a little unclear to me exactly what he does  
4 because he says he is a project manager for Cancer Treatment  
10:33:19 5 Centers for America.

6 But in response to question 42 he says that he has  
7 heard IVC filters are very risky.

8 Question 39 he indicated he may not be able to be  
9 impartial because "I have a bias toward IVC filters."

10:33:36 10 And then it's clear in questions 43, 44, and 63 that  
11 he indicates he potentially cannot be fair because of his bias  
12 against IVC filters.

13 MR. O'CONNOR: We have no objection to that.

14 THE COURT: All right. I agree. He's not equivocal.  
10:33:56 15 He says directly "I am biased against IVC filters" and he  
16 repeats it a number of times. So I will grant the challenge  
17 for cause to Juror 63.

18 MR. ROGERS: Your Honor, our next juror is Juror  
19 Number 80.

10:34:16 20 This individual indicated that she had an uncle who  
21 got a Bard IVC filter who died shortly thereafter, and she  
22 indicates that she has to turn the TV off when she sees  
23 commercials because she gets so angry. And she also indicated  
24 that the FDA is clearly the problem in this country.

10:34:40 25 And specifically in response to question 63 she says,

10:34:44 1 "Without reading anything except what I read in the packet,  
2 I've already formed an opinion in this case. The medical  
3 procedure was likely unnecessary and they did it for money."

4 MR. O'CONNOR: Well, she's a naturalist. Other than  
10:35:08 5 that, we don't object.

6 THE COURT: I'll grant the challenge for cause to  
7 Juror 80.

8 MR. ROGERS: Next, Your Honor, is Juror Number 114.  
9 This gentleman is a retired pilot and he indicates in response  
10:35:27 10 to question 39 that he's unsure that he can be fair and  
11 impartial because of the volume of TV commercials that he has  
12 seen about IVC filters and that leads him to believe there are  
13 problems with the device.

14 And that's really the big issue with him, Your Honor.  
10:35:46 15 He seems to have already formed an opinion that there are  
16 issues with IVC filters, and we believe he should be struck.

17 MR. O'CONNOR: Well, in response to other questions,  
18 though, Your Honor, he certainly indicates he can be fair and  
19 impartial. We can't -- we can't control what people watch on  
10:36:20 20 TV. I think this juror -- we deserve to question this juror  
21 to find out how he'll take this evidence and whether he can  
22 set the TV ads aside.

23 THE COURT: I agree we need more questioning of this  
24 juror, so I'm going to deny the challenge for cause to 114.

10:36:45 25 MR. ROGERS: Your Honor, our next and last challenge

10:36:46 1 for cause, at least with this group, is Juror 199. I don't  
2 know if Mr. O'Connor will agree, but this gentleman really  
3 does not indicate he has any particular biases, but he does  
4 have an IVC filter in place. He does not know the

10:37:02 5 manufacturer. Indicates he has not had any complications.  
6 But I think it would be potentially problematic to have this  
7 juror on the jury, so I think he should go.

8 MR. O'CONNOR: Thanks. That's the note I couldn't  
9 read. I agree.

10:37:18 10 THE COURT: I'll grant the challenge for cause to  
11 Juror 199.

12 MR. ROGERS: Your Honor, even though there's not a  
13 cause strike, there's a few more I want to bring to the  
14 Court's attention.

10:37:34 15 THE COURT: All right.

16 MR. ROGERS: I start with Juror 118. This gentleman  
17 indicates that he's got a son who works as a file clerk at  
18 Snell and Wilmer. So I think he falls into the same category  
19 as Juror Number 2. Or Juror Number 9. Excuse me.

10:37:53 20 THE COURT: Your thoughts, Mr. O'Connor?

21 MR. O'CONNOR: Yeah, no family members. I agree.

22 THE COURT: All right. I will add Juror Number 118  
23 to the challenges for cause.

24 MR. ROGERS: Your Honor, the others were individuals  
10:38:12 25 who I think the Court may want to consider for hardship

10:38:15 1 purposes.

2 Juror Number 6, for instance, did say in response to  
3 question 1 that he was not asking for any hardship, but I did  
4 want to bring to the Court's attention that he has had to have  
10:38:30 5 bladder surgery and has a bladder stimulator. I did want the  
6 Court to note he needs to take frequent bathroom breaks. So I  
7 wanted to bring that to the Court's attention.

8 THE COURT: I think we need to ask him about the  
9 frequency. I think I've had folks like that before who were  
10:38:49 10 able to sit for an hour and a half on the jury. He might be  
11 able to as well, so we should ask him about that.

12 MR. ROGERS: The next one, Your Honor, is Juror 68,  
13 and this is another person that I think we ought to flag for  
14 you for hardship purposes.

10:39:13 15 This gentleman indicates he's been disabled for nine  
16 years. His wife is disabled and his son is disabled. And,  
17 again, he did not ask for hardship excuse in response to  
18 question 1, but in response to question 29 he did indicate  
19 that he was a caretaker for his wife and son who are both  
10:39:33 20 totally disabled.

21 THE COURT: I think we need to ask him questions  
22 about whether that will affect his jury service. It's a fair  
23 question, but I don't think it's answered by the  
24 questionnaire.

10:40:01 25 MR. ROGERS: Lastly, Your Honor, I wanted to bring to



10:40:02 1 your attention Juror Number 163. And again as potential  
2 hardship, and maybe this is somebody we need to bring in, but  
3 this gentleman indicates that he had a severe traumatic brain  
4 injury a few years ago and that it would affect his ability to  
10:40:19 5 read and understand. He also indicates he lost significant  
6 parts of his memory, including his short-term memory. And  
7 that is in response to question 35.

8 THE COURT: Where's the reference to short-term  
9 memory?

10:40:58 10 MR. ROGERS: I wrote in my notes question 35. I may  
11 have been mistaken.

12 MR. O'CONNOR: I think he's talking about someone  
13 who -- he was a witness in a suit against a healthcare  
14 provider.

10:41:11 15 THE COURT: Well, he says he has a permanent memory  
16 loss in 35, but I don't see a reference to short-term memory.  
17 That was my question.

18 MR. ROGERS: Well, Your Honor -- well, I guess what I  
19 was referring to, there is question number 2 where he said "I  
10:41:34 20 had a severe traumatic brain injury a couple of years back  
21 which affects short-term memory."

22 He doesn't necessarily say he has that, but that's  
23 what I was referring to.

24 THE COURT: I see. Okay.

10:41:46 25 Your thoughts, Mr. O'Connor?

10:41:51 1 MR. O'CONNOR: No, I do see that now. I read the  
2 other question differently and thought he was trying to  
3 describe a lawsuit.

4 I don't know what to say. I mean, obviously that  
10:42:05 5 would be a problem if he came and told us. I think that would  
6 be a hardship. But he was able to complete this questionnaire  
7 fairly thoroughly, and he certainly didn't ask to be excused  
8 because of that.

9 I do share the concern on other side, though. I  
10:42:21 10 think we certainly want people that are going to be able to  
11 perceive and understand the evidence and recall what was  
12 presented. Well, we want them to recall what we said not what  
13 the defense said. But recall will be important to us.

14 We would not object if you wanted to excuse him for  
10:42:45 15 hardship, Your Honor.

16 THE COURT: All right. I'm going to do that. I'm  
17 going to do it because he says that the traumatic brain injury  
18 was four years ago and affects -- he says "affects," he  
19 doesn't say "affected" -- affects short-term memory. This is  
10:43:00 20 a case that's going to require lots of short-term memory as  
21 well as put stress on the jurors, so I think we should excuse  
22 Juror 163.

23 Is that all of them, Mr. Rogers?

24 MR. ROGERS: Yes, Your Honor.

10:43:12 25 THE COURT: Subject, then, to the ones that we're

10:43:14 1 still reviewing, the jurors that we're going to -- where I've  
2 granted challenges for cause are Jurors 9, 40, 49, 61, 66, 78,  
3 146, 63, 80, 199, 118, and 163.

4 Does that look right, Traci?

10:43:43 5 THE COURTROOM DEPUTY: Yes, sir.

6 THE COURT: So we will add those to the folks we've  
7 already excused for hardship. We will not have them come in  
8 on the 18th for jury selection.

9 In our previous two bellwether trials we have had 60  
10 jurors come in and we've never gotten to 50 in our jury  
11 selection. There's a cost involved in bringing in jurors we  
12 don't need. So I'm inclined to have 50 appear because we've  
13 made it pretty comfortably with 50 the last two times. But  
14 I'm interested in your thoughts whether you're comfortable  
10:44:31 15 with that or whether you still think we need to bring in 55 or  
16 60.

17 MR. LOPEZ: Could we have two minutes?

18 THE COURT: Sure.

19 MR. O'CONNOR: I'm willing to turn it over to  
10:45:07 20 Mr. Lopez, Your Honor.

21 MR. LOPEZ: Based on history, we've never lost a  
22 juror either, Judge. We have three extras in case we lose  
23 three. So maybe the safe thing to do, if we're going to go  
24 down to 50, maybe we only have eight jurors.

10:45:28 25 MR. ROGERS: Your Honor, I disagree. I think we've

10:45:31 1 done fine with nine and I don't really know why bringing in of  
2 the entire panel really affects number of jurors we seat. I  
3 don't see the connection there, really.

4 But if Your Honor wants to bring in 50, we're fine  
10:45:45 5 with that.

6 THE COURT: All right. Well, I really err on the  
7 side of caution when it comes to the number of jurors. I have  
8 had the experience of losing a juror a week to cause. Since  
9 this is a three-week trial, that's why I picked three  
10:46:04 10 additional jurors.

11 Why don't we bring in 55, Traci. That will save us a  
12 little money in jury funds yet still give us a margin of  
13 comfort.

14 So we'll have 55 jurors appear on the 18th for jury  
10:46:20 15 selection.

16 Please remember, Counsel, that you need to get to  
17 Nancy, she'll be back by then, the witness list in a form that  
18 we can hand it out to the jurors in the jury room on the  
19 morning they appear. So please be sure to get that to us,  
10:46:40 20 let's say by noon on September 14th. So by noon a week from  
21 tomorrow. That way there will be plenty of time to copy it  
22 and have it down to the jury office on the 17th so they can  
23 hand it out on the morning of the 18th.

24 We handed out the voir dire questions to you.

10:47:15 25 They're very generic. I took out of them the FDA questions

10:47:21 1 that we asked in the Booker trial because we put those into  
2 the questionnaire.

3 So they're just the very generic kinds of questions  
4 that we asked to see if any other issues have come up. So  
10:47:34 5 look over those.

6 If there are additional voir dire questions you think  
7 should be asked, please be prepared to address those when we  
8 start at 8:30 on the 18th and I'll be happy to hear any  
9 suggestions that you have.

10:47:47 10 I've also given you preliminary jury instructions.  
11 They're also very generic. Although the second one is a brief  
12 description of the case that I've modified to reflect the  
13 nature of this case. So look over that and see if you have  
14 any concerns, and we can hear those as well on the morning of  
10:48:09 15 the 18th.

16 And we'll follow the same jury selection practices we  
17 had before: We'll seat all 55 jurors in order. I'll ask my  
18 general voir dire questions. We'll then give plaintiff a  
19 chance for follow up and defense a chance for follow up. And  
10:48:29 20 then we'll excuse the jurors, hear challenges for cause, and  
21 then have you exercise your peremptory -- your three  
22 peremptory challenges per side.

23 Any questions on jury selection? Or issues?

24 MR. ROGERS: No, Your Honor.

10:48:49 25 MR. O'CONNOR: I'm just looking at -- no other

10:48:54 1 questions. When you're ready, I think we can make a record on  
2 the other -- on the other questionnaires.

3 THE COURT: Oh. Let's go ahead and do that now.

4 MR. O'CONNOR: Your Honor, number 35 is the one that  
10:49:13 5 we would move for cause on. And just quickly going through  
6 this, her response to number 36 she ranks us low, but I  
7 thought -- in response to question 39, the question is, is  
8 there anything in this that causes you to believe you could  
9 not consider the evidence clearly? And she let's us know that  
10:49:53 10 her mother's a high-risk cardiac patient and she's also a  
11 Banner Health employee.

12 She thinks there's too many lawsuits in response to  
13 other questions. And then at the end she again has alerted us  
14 as to reasons why she can't be fair and impartial. Due to her  
10:50:14 15 current lifestyle she has a soft spot for elderly people.  
16 Granted, I don't think that's directly relevant here, but what  
17 is important is that she's already telling us she can't be  
18 fair and impartial.

19 And then in response to 64 she made it a point to  
10:50:33 20 tell us that she works in a healthcare facility. She gets  
21 told stories all the time from patients.

22 And so it seems to me that just on its face this is a  
23 potential juror who is telling us that her life experiences  
24 and what she's learned is going to cause her difficulty to be  
10:50:51 25 fair and impartial in this case.

10:50:54 1 THE COURT: All right. Mr. O'Connor, you have my  
2 copy. Could you bring that up with the other three as well,  
3 please.

4 MR. O'CONNOR: Sure.

10:51:02 5 That's number 35.

6 THE COURT: Mr. Rogers.

7 MR. ROGERS: Your Honor, we agree. This juror is a  
8 little bit of a mixed bag, but she does indicate some biases.

9 And in response to 41 she also says she may -- she  
10 doesn't really answer the question regarding bias, but she  
11 says she has heard something about Bard and indicates she had  
12 a patient, slash, friend, who had dislikes about Bard products  
13 from her previous surgeries. She doesn't indicate what those  
14 are. But I agree, Your Honor, she probably is showing some  
10:52:04 15 biases and ought to be struck.

16 THE COURT: She also says in her questionnaire, I  
17 noticed this when I looked at it, that she could not follow  
18 the Court's directions about not communicating on social media  
19 regarding the case.

10:52:19 20 I'm going to grant the challenge for cause to Juror  
21 35.

22 That means that Jurors 21, 42, and 144 will be added  
23 to the list of jurors from whom we will bring in the 55 on the  
24 18th.

10:52:38 25 MR. O'CONNOR: Your Honor, I'm just reminded, we left

10:52:39 1 our Post-its on your copies.

2 THE COURT: Would you like them back?

3 MR. O'CONNOR: I think -- I'll come up and remove  
4 them for you.

10:52:51 5 THE COURT: They're fine. We'll throw them away.  
6 Unless you need them for some purpose.

7 MR. O'CONNOR: I'm sorry?

8 THE COURT: So we'll add Juror 35 to the list of  
9 jurors who will not be brought in.

10:53:07 10 MR. O'CONNOR: Again, Your Honor, can you repeat the  
11 number?

12 MS. REED ZAIC: 35?

13 THE COURT: 35.

14 MS. REED ZAIC: I thought you said 144.

10:53:17 15 MR. LOPEZ: I missed the three that you said were  
16 remaining, Judge.

17 THE COURT: The ones who are remaining, of the new,  
18 are Jurors 21, 42, and 144.

19 MS. REED ZAIC: That's it. Okay.

10:53:27 20 THE COURT: So we'll take the 55 lowest numbers that  
21 remain and those will be the folks who will be asked to come  
22 in on the 18th for jury selection.

23 For purposes of trial, as we've discussed, we'll  
24 start on the 18th. We'll get the jury chosen by some point in  
10:53:52 25 the noon hour. So we should be able, after the lunch break,



10:53:56 1 to go right into openings and evidence. We'll plan to go to  
2 4:30 that day.

3 We'll be in trial on the 19th, 20th, and 21st.

4 We've agreed on Monday the 24th we will start in the  
10:54:11 5 afternoon, so we'll start at 1 p.m. on the 24th.

6 Does that work for you, Mr. Lopez?

7 MR. LOPEZ: Yes, Your Honor.

8 THE COURT: And we will then be in trial on the 25th  
9 through the 28th. And on August 1st through the 5th.  
10:54:27 10 October.

11 We've allocated 33 hours to plaintiff and 30 hours to  
12 defense. That was in Docket 11871.

13 As you've seen from my order, I've concluded that we  
14 should bifurcate punitive damages as we did in the earlier two  
10:54:48 15 trials.

16 By my count, if each side reserves an hour for the  
17 punitive damages phase, then we should get this case to the  
18 jury on the morning of October 4th, Thursday. We might even  
19 conclude closings on the afternoon of October 3rd. And I  
10:55:07 20 think that's good. That gives us a couple days both for jury  
21 deliberations and for the punitive presentation.

22 So that's the schedule we'll follow in the case. And  
23 I'll plan, as we have in the past, to go until probably 4:30  
24 on the days I can. I have -- I've already scheduled hearings  
10:55:27 25 every day in the trial at 4:30, so there may be a day or two

10:55:31 1 where we have to break a few minutes early if there's  
2 something I need to do to prepare for one of those hearings.

3 I will give you, as I have in the past, my prelim--  
4 I'm sorry, my proposed final jury instructions early in the  
10:55:45 5 trial. If I can get them done next week I'll get them to you.  
6 Although, looking at next week, I'm not sure I'll be able to  
7 do that. In any event we'll get them to you during the first  
8 week of the trial.

9 I was told this morning that I have received 22  
10:56:03 10 depositions from you all in the last two days. Is that right?

11 MR. LOPEZ: Sounds about right. Having reviewed --  
12 been involved in the process, that sounds about right.

13 THE COURT: I would be thinking we'd be reducing the  
14 number of depositions I have to review as we go through these  
10:56:23 15 bellwethers.

16 MR. LOPEZ: Well, the numbers are the same, but --  
17 we'll probably have to meet and confer based on some of the  
18 rulings we've seen on others because of Wisconsin law and the  
19 effect of the MSJ on failure to warn.

10:56:33 20 If you recall, we just went through previously ruled  
21 on and designated to see if we had any objections based on the  
22 failure to warn MSJ ruling and Wisconsin law, and then you  
23 granted us leave to go back on some.

24 We didn't -- neither side, I think, abused that. We  
10:56:52 25 were very selective about additional questions in a number of

10:56:57 1 those.

2 THE COURT: Okay.

3 MS. HELM: Your Honor, I just wanted to reiterate  
4 many of those it's four, five pages. So you didn't get 22  
10:57:07 5 complete depositions to have to review again.

6 THE COURT: Okay. Well, I will do my best to get  
7 through those soon, but given my schedule over the next week,  
8 there may be some of those you don't get my rulings on until  
9 late next week or even the weekend after this.

10:57:27 10 I've got some plane time on Wednesday going to DC  
11 that I might be able to get the rest of them done, but I just  
12 don't know. So I'll do my best to get them out, but some of  
13 these might come in pretty close to the start of trial.

14 MR. LOPEZ: I think knowing that, and knowing that  
10:57:47 15 sometimes we ask for -- we did this before. We've got a sense  
16 of where the Court was going on some of these things. And  
17 certainly by the time we get to trial, we don't play -- we  
18 just want to make sure we have your rulings in case we take  
19 stuff out and what we do.

10:58:05 20 I will tell this the Court this: Since we're putting  
21 that evidence on first, we'll commit to looking at those  
22 depositions and getting to the Court probably pared down  
23 versions of those based on what I think -- stuff I think we  
24 probably need to take out based on your rulings, or maybe  
10:58:24 25 leave in.

10:58:29 1 THE COURT: Are you talking, Mr. Lopez, about the 22  
2 received today? Do you want to take another pass through  
3 them?

4 MR. LOPEZ: No. I'm just trying to accommodate the  
10:58:36 5 Court more than anything else. I'm not sure -- that might be  
6 an effort not worth doing because --

7 THE COURT: Well, I'm in meetings all day tomorrow  
8 and all day Saturday, but I'm going to have some breaks and I  
9 intend to start then. I'm just going to load them all on my  
10:58:51 10 iPad and start churning through them. So I'd say don't -- I  
11 appreciate the suggestion, but I don't know when I'm going to  
12 get to them so I'll just start as soon as I can and I would  
13 say you shouldn't redo them.

14 MR. LOPEZ: Okay.

10:59:04 15 THE COURT: All right. Let's talk about the motions  
16 in limine.

17 I've been through all of the motions in limine and I  
18 can get you my ruling on those probably today. There's one  
19 that I wanted to talk through with and you, and if you have  
10:59:19 20 others you want to make additional argument on I'll be happy  
21 to let you do that, and that's defense Motion in Limine  
22 Number 5 with respect to Dr. Kandarpa.

23 I've read both sides' briefs. I want to explain to  
24 you my thinking on this so you can point out where you  
10:59:41 25 disagree.

10:59:44 1 Here -- here's my view. Dr. Kandarpa is a fact  
2 witness in this case. He's not been designated as an expert.  
3 There was no expert report given.

4 I didn't allow him in the first two trials because of  
10:59:58 5 nondisclosure, but I concluded the prejudice from that can be  
6 cured for this trial so I've allowed him as a fact witness for  
7 this trial.

8 The issue that is addressed in the motion in limine  
9 arises only to the extent that Dr. Kandarpa gives opinion  
11:00:15 10 testimony. He can testify as a fact witness without any  
11 Rule 701 or 702 concerns.

12 He can give opinion testimony only under Rule 701 as  
13 a lay witness. He can't give opinion testimony under Rule 702  
14 because he's not a designated expert in the case and has not  
11:00:37 15 been identified as an expert.

16 Rule 701 says that a lay witness can give opinion  
17 testimony but not if the opinion is based on scientific,  
18 technical, or other specialized knowledge within the scope of  
19 Rule 702.

11:00:58 20 So even if there's a factual basis and there's a  
21 perception and 701 is otherwise satisfied, the opinion can't  
22 be given under 701(c) if it is based on scientific, technical,  
23 or other specialized knowledge within the scope of Rule 702.

24 The line between lay opinion testimony and testimony  
11:01:20 25 covered by Rule 701(c) can sometimes be very difficult to

11:01:24 1 draw, in my experience.

2 The Ninth Circuit has said in a decision last year,  
3 *United States versus Barragan*, B-A-R-R-A-G-A-N, 871 F.3d 689  
4 at page 704 that "The line between lay and expert opinion  
11:01:45 5 depends on the basis of the opinion not its subject matter."  
6 That's all they say. You can read the rest of the case and  
7 there's no more illumination than that.

8 That helps a little bit, but here's the difficulty.  
9 Let's say a witness, Dr. Kandarpa, makes statement expressing  
11:02:05 10 his viewpoint or his opinion during the deposition that is  
11 based in part on what he heard and saw and did in the EVEREST  
12 study and in part upon his specialized knowledge as a doctor.  
13 Is that a lay opinion or is that an expert opinion?

14 I don't know any clear line you can articulate on  
11:02:29 15 that in the absence of actually looking at the question and  
16 making the best judgments.

17 So my view is that what I need to do with respect to  
18 Dr. Kandarpa is rule question by question on whether I think  
19 an answer is a 701(c) opinion that is inadmissible or a 701(a)  
11:02:49 20 and (b) opinion that is admissible.

21 I will tell you the thinking I will go through on  
22 that question. When I look at a question I'm going to ask  
23 three things: Number one, is it an opinion. If it's not,  
24 it's okay.

11:03:01 25 Number two, is it based on his work in the EVEREST

1 study or on his specialized knowledge as a doctor?

2 And number three, I'll look at the context to try to  
3 answer that question.

4 And where I see a question or an answer, an opinion  
5 that is based in part on his work in EVEREST and part on his  
6 role as a doctor, I'm just going to have to make my best  
7 judgment as to whether I think that is a legitimate lay  
8 opinion or expert opinion.

9 That's the way I think I need to approach it and just  
10 do it question by question. But I'm interested in your  
11 thoughts on whether any of you see it differently.

12 MR. LERNER: Your Honor, do you want me at the  
13 podium?

14 THE COURT: Yeah, please, so everybody can hear you.

15 MR. LERNER: Your Honor, I agree with you.  
16 Dr. Kandarpa is one of the depositions we submitted to you. I  
17 think there's some questions in there that are clearly opinion  
18 related and things that he had an opinion about before the  
19 EVEREST study that's unrelated to the EVEREST study, and then  
20 there's opinions that he's offering that are not just based on  
21 facts or observations from that study that I think you just  
22 have to make a ball-and-strike call on.

23 I will note that sometimes I think the plaintiffs  
24 were thinking about this and sometimes in their questioning  
25 they would ask the question as a medical monitor and ask the

11:04:22 1 question as if it was not opinion based. So -- trying to get  
2 over this hurdle.

3 So when you're reviewing that deposition, I think the  
4 fact that they asked the question that says as a medical  
11:04:35 5 monitor, X, Y, Z, it still may be something that calls for  
6 expert opinions and that was not disclosed to us.

7 But I agree with your overall assessment. It's going  
8 to be ball and strike, question by question.

9 THE COURT: Okay. Thanks.

11:04:50 10 Mr. Lopez.

11 MR. LOPEZ: I understand the struggle between those  
12 sections in 701. I did point out, however, I think I gave you  
13 the testimony that for the most part I think he was testifying  
14 about his observations as the medical monitor in the EVEREST  
11:05:10 15 study. I think where it gets difficult is if he answers a  
16 question based on EVEREST, he's doing that as a person hired  
17 by Bard because of his credentials and expertise. So I'm not  
18 sure how you parse that out. I don't know that you can. I  
19 don't know that it's fair that you do if in fact his opinions  
11:05:36 20 or his statements about the EVEREST study are based on the  
21 fact that he is this highly qualified interventional  
22 radiologist who was hired by Bard to adjudicate those adverse  
23 events.

24 The other thing, Your Honor, I just -- again, I'm  
11:05:54 25 mindful of the fact that we've had a number of other witnesses



11:05:57 1 who were not Rule 26 experts. Dr. Trerotola is one that comes  
2 to mind. You'll see we submitted some additional objections  
3 to his deposition testimony and ask you to actually add some  
4 testimony to it. There are opinion testimonies throughout  
11:06:16 5 that deposition designation by the defense. And same with  
6 Dr. DeFord.

7 So I just bring that to the Court's attention because  
8 there have been some exceptions to someone rendering opinions  
9 even though they haven't been designated as Rule 26 experts  
11:06:32 10 nor have they provided a report, but because of their special  
11 relationship with Bard or the issues that are related to their  
12 testimony, the Court has in fact allowed a lot of what I --  
13 certainly the plaintiffs would consider expert testimony by at  
14 least those two. I'm sure I could think of others. But those  
11:06:53 15 are two depositions I happened to work on so I know about  
16 those two right now.

17 But I understood the rules and I understand the  
18 evidence that applies to these. But I also wanted to bring to  
19 the Court's attention the special relationship with Bard and  
11:07:08 20 how -- one more point I wanted to make, Your Honor, is  
21 sometimes opinions that he might have that he expressed are  
22 opinions -- our position's going to be maybe these are  
23 conversations that Bard should have had with Dr. Kandarpa when  
24 he was in that role and these are opinions he would have  
11:07:29 25 rendered to them or did. And they should have been mindful of

11:07:35 1 his opinions as the medical monitor based on his expertise  
2 when they made certain decisions and representations to the  
3 FDA, doctors, patients, et cetera.

4 THE COURT: I'm not sure I'm understanding your last  
11:08:07 5 point, Mr. Lopez.

6 MR. LOPEZ: Well, if Dr. Kandarpa has opinions about  
7 what was going on, I mean some of the opinions you're talking  
8 about were opinions that Bard had an opportunity to obtain  
9 from someone like him before they submitted their final report  
11:08:25 10 on EVEREST, before they decided to make certain decisions  
11 about the continuing marketing of the G2 device without maybe  
12 changing the warnings, making design changes.

13 So I think his opinions is in his capacity as an  
14 agent at the time, and certainly he was an expert to them,  
11:08:45 15 about what his -- what advice he would have given to Bard had  
16 they asked. That's -- I think that's relevant in the case.

17 Just like what Dr. Trerotola says about in his  
18 opinions with respect to his experience in working with Bard,  
19 with those devices, in particular the G2 device, him making a  
11:09:10 20 statement that the medical community considered the Simon  
21 Nitinol filter the Simon frightenol filter. Those are expert  
22 opinions in addition to hearsay.

23 But I think there is another issue here with respect  
24 to Dr. Kandarpa's special role and relationship, not just to  
11:09:29 25 the EVEREST study as a study, but to the patients and the

11:09:33 1 risks and complications of those patients and the kind of  
2 advice they could have received from Dr. Kandarpa about that  
3 had they asked. And the opinions that he renders, I think. I  
4 think you're talking about opinions he's rendering, isn't that  
11:09:49 5 something doctors should have known.

6 Certainly our position's going to be why didn't you  
7 ask Dr. Kandarpa about that while you had access to him, who  
8 was the person who that the most and the best knowledge about  
9 what was going on with that patient population.

11:10:06 10 THE COURT: Okay.

11 MR. LOPEZ: Thank you, Your Honor.

12 THE COURT: Mr. Lerner.

13 MR. LERNER: Your Honor, Dr. Kandarpa's role was to  
14 adjudicate whether something was a complication or not. So to  
11:10:18 15 the extent he's offering opinions, they asked questions about  
16 does that relate to the brochures or this cascade theory they  
17 developed. Those are all opinion related things. If they  
18 wanted to disclose him as an expert, they had a disclosure  
19 requirement or report requirement.

11:10:34 20 So I think it all goes back to what you said earlier.  
21 Question by -- question by question analysis. But he's there  
22 to testify about his facts, his observations, what he saw, the  
23 documents that he submitted. Those sorts of things. But  
24 there's a lot of things here that go beyond those things that  
11:10:51 25 are really opinion related and that, given the disclosure

1 requirement, report requirements, they should have been  
2 disclosed if they were going to offer those opinions.

3 THE COURT: Okay. Thanks.

4 You know, there's a second issue that I've wrestled  
5 with and I'll mention to you just so I can get the benefit of  
6 your thinking. One question that I just tried to outline is  
7 what do you do when an expression of opinion is based in part  
8 on what Dr. Kandarpa saw or heard or did in the EVEREST study  
9 and in part on his expertise as a doctor.

10 There's another line that's been drawn in some of the  
11 cases on expert disclosure. It's a line that's drawn, used to  
12 be drawn, when dealing with Rule 26 disclosures before Rule  
13 26(a)(2)(C) was added, which is the obligation of a lawyer to  
14 disclose expert opinions that don't have to be in an expert  
15 report.

16 So cases that were dealing with the question of what  
17 has to be in an expert report before there was an (a)(2)(C),  
18 including the *Goodman* case in the Ninth Circuit, drew the line  
19 between an opinion that was formed by a doctor in the course  
20 of treatment and an opinion that was not formed in the course  
21 of treatment, that was developed later.

22 The example being if a doctor, you know, who was  
23 caring for a cancer patient developed the opinion in the care  
24 that the patient had five years to live, that would be an  
25 opinion developed as part of his care of the patient. And if

11:12:35 1 there's a trial later and the doctor adds an opinion that the  
2 cancer was caused by exposure to a particular substance, an  
3 opinion that was not formed during the course of treatment but  
4 was a causation type opinion. The way the courts dealt with  
11:12:53 5 that is that the opinion formed after the treatment or  
6 independent of the treatment had to be disclosed under Rule  
7 26(a) (2) (B) in an expert report. The opinion formed during  
8 the treatment didn't have to be because it was part of the  
9 treatment.

11:13:07 10 Now, that was a Rule 26 way of thinking of things.

11 But I suppose in a case like this you could say that  
12 opinions Dr. Kandarpa formed during and as a result of his  
13 involvement in the EVEREST trial are facts related to the  
14 EVEREST trial. It's an opinion he developed that is now a  
11:13:30 15 fact of something that arose from the EVEREST trial and is not  
16 really the expression of a new opinion.

17 Whereas an opinion that he states in the deposition  
18 that didn't arise from his involvement in the EVEREST trial is  
19 an expert opinion under Rule 702.

11:13:49 20 It's another place to draw the line. It's imperfect  
21 for a number of reasons. But I'm just interested in any  
22 thoughts you all have on that question.

23 MR. LERNER: Your Honor, when I was looking at this I  
24 was looking at your standing order in the *Goodman* case as  
11:14:07 25 well, and I thought that with the new requirement we can do

11:14:09 1 disclosures that you don't need a report that the distinction  
2 was under Ninth Circuit law, the *Goodman* case, was that if you  
3 had opinions formed during the course of treatment, maybe  
4 during the EVEREST study, that requires a full expert report.  
11:14:24 5 And then opinions formed -- I'm sorry. Opinions formed during  
6 the course of treatment or during the EVEREST study is ones  
7 you do disclosures. Opinions that are formed outside of the  
8 EVEREST study, like outside of a treatment, that's when you  
9 need the full report.

11:14:40 10 So I was thinking along the same lines that that's  
11 how you distinguish those.

12 But even the opinions that are formed during the  
13 EVEREST study, if you make that analogy to a treating  
14 physician, you would have to do disclosure. So when we took  
11:14:55 15 the deposition, we're preparing for the deposition, we know  
16 the summary of his opinions and basis and we can test those  
17 and don't have to do it on the fly, and then we can analyze  
18 *Daubert* challenges, see if we have to file a *Daubert* motion.  
19 Here we didn't have that opportunity. There's no disclosure  
11:15:11 20 either way about the opinions that were going to be offered.

21 MR. LOPEZ: Your Honor, I think we were very careful  
22 in that deposition when we asked him questions about whether  
23 or not this was based on his observations as the medical  
24 monitor and the facts as related to his role as the medical  
11:15:33 25 monitor in the EVEREST trial. Not, you know, based on what

11:15:38 1 you've heard since and based on other facts after that time  
2 period and his state of mind as it existed at that time. We  
3 made it clear this was based on those facts as they existed  
4 and where his mind was at that time and not something that  
11:15:54 5 would have transpired after that.

6 THE COURT: All right. Thanks for your comments.

7 The Kandarpa deposition transcript that came in I  
8 deleted because you called and said don't use it.

9 MR. LOPEZ: I'm sorry, I didn't hear that.

11:16:09 10 THE COURT: I deleted the deposition transcript  
11 because there was a call to our office saying don't rule on  
12 this, we're still working on an issue. So I don't have the  
13 transcript you all previously submitted.

14 MS. HELM: It's actually been resubmitted, Your  
11:16:21 15 Honor.

16 THE COURT: In the last couple days?

17 MS. HELM: If you'll give me a minute, I'll search  
18 and find when we sent it, but it definitely was resubmitted.

19 THE COURT: All right. It's not in the list of the  
11:16:33 20 22 depositions that we counted this morning in our e-mails.

21 MS. HELM: It came in before those. But, Your Honor,  
22 I'll find it and resend it to Nancy's e-mail.

23 THE COURT: No. Send it to Jeff's e-mail. Nancy's  
24 not in town and she has 4,000 e-mails in her inbox right now.  
11:16:52 25 We'll never find it.

11:16:54 1 MS. HELM: Okay. I will find it and make sure I  
2 e-mail it to Jeff.

3 THE COURT: Okay. I will think about what you've all  
4 said and go through and rule question by question.

11:17:03 5 MR. LOPEZ: I was going to say don't make that number  
6 23, Judge. Move those down and make Kandarpa maybe one, two,  
7 or three on the list you go through.

8 THE COURT: Because he's earlier in your  
9 presentation?

11:17:14 10 MR. LOPEZ: He will be. Plus it's the subject of a  
11 motion anyway. You'll probably do that anyway.

12 THE COURT: Well, do you need him earlier?

13 MR. LOPEZ: Yes.

14 THE COURT: Okay. I'll try to get to him earlier.

11:17:28 15 Okay. As I mentioned, I've been through all of the  
16 other motions in limine. Do plaintiffs want to make arguments  
17 on any of those other motions that have been submitted?

18 MS. REED ZAIC: Actually, it was in opposition to  
19 defendants' motions, so I don't know that I should have jumped  
11:17:52 20 up first. It's not our motion. The opposition to the  
21 cephalad migration evidence. I wanted to make a comment --

22 THE COURT: That's fine. Yeah, that's fine.

23 MS. REED ZAIC: I'm not trying to be psychic, but I  
24 did notice in a ruling on a particular transcript you  
11:18:09 25 indicated that the Court seems to be leaning towards excluding



1 the Recovery death migration evidence because there is an  
2 issue whether this was an Eclipse.

3 I just wanted to add comment, Your Honor, that in our  
4 motion opposing the Recovery migration death evidence I  
5 pointed out that we absolutely understood the Court's  
6 admonitions in the Booker trial to not run away with that  
7 evidence and we were very, very specific starting from opening  
8 with regard to the design of the filter our position that it's  
9 extremely important for us to be able to present to the jury  
10 why the redesign from Recovery to the G2 filter took place.  
11 And we were very careful to limit the evidence to that in  
12 presenting it to the jury.

13 And the reason why it's particularly important in  
14 this case is that we have to provide the -- presumably we will  
15 have to provide some basis for feasibility. Some sort of  
16 argument about the feasibility. And there was an immediate  
17 reaction when it came to what was happening publicly regarding  
18 the migration deaths and the timing of which they ran back to  
19 the table to redesign, as opposed to later on with the G2  
20 filter the argument from the defendants seems to be that these  
21 were asymptomatic. There was not this public outpouring and  
22 knowledge of resistance to using the product.

23 So in presenting our ability -- their ability to sit  
24 down and redesign a filter quickly, that's a key piece of  
25 evidence. Again, understanding the Court's admonition that

11:19:41 1 we're not to run away with that evidence.

2 I just wanted to make that additional comment or  
3 argument. And I'm taking advantage of I got a preview --

4 THE COURT: Right. Let me ask you a question on that  
11:19:51 5 point, Ms. Reed Zaic, because I saw that argument in your  
6 brief.

7 I understood you to be saying that it's going to be  
8 important for you to be able to tell the jury that this  
9 company can act quickly and make changes to filters when it's  
11:20:06 10 motivated to do so.

11 MS. REED ZAIC: Can act quickly, yes, Your Honor.

12 THE COURT: If I were to stand by my ruling on  
13 cephalad death evidence, there is nothing that would preclude  
14 you from putting in evidence that Bard acted quickly to put  
11:20:21 15 the G2 on the market when the Recovery filter problems were  
16 known. You could still show that within nine months it had  
17 something on the market and therefore has the ability to be  
18 nimble and quick when it wants to do so, to make the very same  
19 point that it's not true that it takes years and years to  
11:20:39 20 develop a filter. What is your thought on that?

21 MS. REED ZAIC: My thought on that is, again, because  
22 it was public, because these deaths were -- pardon me.  
23 Because this was a public issue that they were reacting to,  
24 they were motivated. Right? It goes to their conduct. They  
11:20:59 25 were motivated to sit down more quickly when it's a death.

11:21:02 1 Right now what would be presented -- first of all,  
2 there's evidence we wouldn't be able to put in front of the  
3 jury at all regarding their ability, not only the feasibility  
4 that their redesign but their conduct in we treat this  
11:21:12 5 situation completely different.

6 Although people can die from G2 related injuries and  
7 complications, in the moment when it was apparent and a public  
8 communications risk with their company, that's what drove them  
9 to sit down and redesign. And whereas they didn't have that  
11:21:29 10 second -- that scenario the second time around, they didn't  
11 run back and redesign it.

12 I think that it's an issue of it not being complete  
13 if I've got redacted statements about injuries and pointing  
14 out this happened before they were able to sit down. The  
11:21:44 15 gravitas of it with regard to Bard's conduct is not going to  
16 be clear to the jury.

17 THE COURT: Okay. Thank you.

18 All right. Defense counsel, do you have points you  
19 want to make on any of the motions in limine?

11:22:13 20 MR. ROGERS: Your Honor, I believe Mr. North is going  
21 to address Ms. Zaic's comments.

22 THE COURT: That's fine.

23 MR. NORTH: Your Honor, I would just point out  
24 briefly that there's nothing in this Court's previous ruling  
11:22:25 25 in Jones that precluded the plaintiffs from introducing

11:22:29 1 evidence that the Recovery filter did have reports of  
2 migration and did have reports of fracture. The complication  
3 evidence was allowed to go in. It was merely the inflammatory  
4 and prejudicial evidence about the deaths themselves that did  
11:22:45 5 not go in.

6 But they can make the point that Ms. Zaic is saying  
7 they need to make by pointing out that we acted quickly when  
8 there were reports of complications of fracture and of  
9 migration.

11:22:59 10 I would also note, Your Honor, that this particular  
11 instance in Hyde is very different from what the Court faced  
12 in Booker because of the date of implant.

13 Ms. Booker's implant was 2006, only a year or so  
14 after the G2 had been placed in the market. Ms. Hyde's  
11:23:18 15 implant was Feb- -- yeah, February of 2011. And so the  
16 Recovery filter migration death evidence is extremely remote  
17 to any of the issues relevant to Ms. Hyde's claim. And for  
18 that reason, we would ask the Court to adhere to the ruling in  
19 Jones.

11:23:37 20 THE COURT: Okay. I understand the parties' views on  
21 that issue.

22 I will get you a decision on the non-Kandarpa motions  
23 in limine today, I'm pretty confident. Tomorrow in any event.

24 All right. Let's talk about matters that are raised  
11:24:07 25 in the final pretrial order. I went through it. There's

11:24:11 1 several issues I wanted to take up with you.

2 First, a procedural question. Do you want me to read  
3 to the jury, as I think I did before, the stipulations that  
4 are contained on pages 4 and 5 of your final pretrial order?

11:24:43 5 MR. ROGERS: Your Honor, the defendants would agree  
6 to that.

7 THE COURT: So what I'm referring to specifically are  
8 the stipulations in section C(1)(a) through (1) that's on  
9 pages 4 and 5.

11:25:24 10 MR. O'CONNOR: That's fine. Through (1) you said; is  
11 that right, Your Honor?

12 THE COURT: Yeah, through (1).

13 MR. O'CONNOR: We have no objection.

14 THE COURT: Okay. I will read those stipulations,  
11:25:35 15 then, before the openings.

16 It seems to me, as I do read that, that I ought to  
17 read the footnote on page 4 about the fact that there's a  
18 disagreement on whether this is a G2X or Eclipse so the jury  
19 understands that going in. And I'd just read that as part of  
11:26:15 20 the sentence on paragraph (1)(b). Does that make sense to you  
21 all?

22 MR. ROGERS: Yes, Your Honor.

23 MR. O'CONNOR: That makes sense to us, Your Honor.

24 MR. LOPEZ: I'm sorry, Your Honor. I'm reading (1).  
11:26:51 25 I'm thinking ahead to evidence and argument under (1)(1).

11:26:59 1 Dr. Kuo actually calls that a complex removal process. The  
2 use of the word "percutaneous" has some significance in this  
3 case because certainly the patient brochure and things like  
4 that use the term "percutaneous procedure." That simply means  
11:27:21 5 he didn't have to open up her chest. But that doesn't mean  
6 this device was removed in the manner in which Bard had  
7 represented and which --

8 THE COURT: Well, why don't I -- Mr. Lopez, why don't  
9 I just take out the last four words of that sentence and say  
11:27:35 10 Dr. William Kuo removed the filter and fractured strut.

11 MR. LOPEZ: That's fine. That works.

12 THE COURT: That's the fact that needs to be told to  
13 the jury.

14 Is that all right?

11:27:46 15 MR. ROGERS: That's fine, Your Honor.

16 THE COURT: All right. The next question I wanted to  
17 ask is on page 8 of the final pretrial order where the  
18 defendants raise an argument -- they actually raise it on page  
19 9. It's actually over on page 10 -- that the negligence per  
11:28:19 20 se claim in this case is preempted under the *Buckman* case.

21 There's a lot of briefing on that in the final  
22 pretrial order. I guess my question is what do you want me to  
23 do with it? Do you want me to rule on that before trial?

24 It wasn't brought in a motion for summary judgment.

11:28:51 25 But if I were to agree with it, it would presumably save some

11:28:56 1 trial time because I assume there's an expert who's going to  
2 testify about how the actions did not comply with certain  
3 federal statutes and regulations.

4 So I guess my thought has been if that's an argument  
11:29:09 5 that's going to be made in a Rule 50 motion at the close of  
6 plaintiffs' case, and if I were to agree with it, then the  
7 plaintiffs would have wasted several hours on it.

8 So do you want me to rule on that before the start of  
9 trial? That's really the question I have.

11:29:26 10 MR. ROGERS: Your Honor, the defendants would. And  
11 we did not move on it at summary judgment, you're correct  
12 about that, and -- but we did not know until we got the  
13 proposed pretrial order from plaintiffs exactly what the  
14 underlying bases for their negligence per se claim was. And  
11:29:46 15 when we did receive that, we learned that there were nothing  
16 but the federal statutes and regulations that relate to the  
17 FDA. And so hence we put the negligence per se arguments into  
18 the pretrial order. So I do think it would be helpful if the  
19 Court ruled on that prior to trial.

11:30:03 20 MR. O'CONNOR: Your Honor, this was Mr. Goldenberg's  
21 issue, but I have -- do you want to go ahead -- are we in  
22 agreement?

23 MR. GOLDENBERG: Your Honor, I think it would be very  
24 helpful for you to rule on this before. I think, again, we  
11:30:15 25 feel confident in what our argument is, but I think everybody

11:30:20 1 should know this just because I think it will help streamline  
2 the trial and also make sure that we're much more efficient as  
3 to how we present evidence.

4 THE COURT: Okay.

11:30:31 5 MR. LOPEZ: One more point. This also includes lay  
6 witnesses. There's a number -- in fact, the depositions we're  
7 going to read where we ask questions about federal regulations  
8 of even corporate witnesses, so I would just echo the thought  
9 we'd like --

11:30:46 10 THE COURT: All the more reason. Okay.

11 I will get you a ruling on this issue based on the  
12 briefing that's here as soon as we can. By the middle of next  
13 week, I think.

14 All right. On page 45 of the final pretrial order,  
11:31:06 15 defendants request that each side notify the other 48 hours in  
16 advance as to who live witnesses will be and 24 hours in  
17 advance regarding deposition designations.

18 Ms. Helm.

19 MS. HELM: We've actually reached an agreement on  
11:31:26 20 that this morning, Your Honor.

21 THE COURT: Okay.

22 MS. HELM: Mr. O'Connor and I --

23 THE COURT: That's what you've agreed to?

24 MS. HELM: Yes, Your Honor.

11:31:31 25 THE COURT: Okay. So as in the prior -- is that



11:31:33 1 right, Mr. O'Connor?

2 MR. O'CONNOR: That's correct, Your Honor.

3 THE COURT: Okay. So as in the prior trial, be sure  
4 to give the other side 48 hours advance notice on live  
11:31:42 5 witnesses, 24 hours advance notice on deposition portions that  
6 are going to be played.

7 MS. HELM: Your Honor, we actually also agreed to 24  
8 hours notice on exhibits for witnesses. For any witness being  
9 played the next day.

11:31:56 10 THE COURT: Okay.

11 MS. HELM: Presented the next day.

12 MR. O'CONNOR: Well, we didn't -- I don't -- are we  
13 in agreement with that?

14 MR. LOPEZ: Well, I mean, the practice has been we've  
11:32:09 15 said that, but both sides, because of how busy we are, usually  
16 doesn't happen 24 hours, it happens the night before. So I  
17 don't want to be stuck with that rule and have it -- have you  
18 rule we can't use a document because of it. Because I know  
19 from the practice of the past two trials we've said 24 hours  
11:32:27 20 and we're both sending documents to each other at 1 o'clock in  
21 the morning, which is about eight or nine hours before we  
22 actually put on a witness.

23 THE COURT: Ms. Helm.

24 MS. HELM: Your Honor, I think both sides can use our  
11:32:40 25 best efforts to get as much possible 24 hours -- as I recall

11:32:44 1 last time we talked about this, you said I'm not going to  
2 exclude an exhibit because you thought of it at 1:00 in the  
3 morning.

4 So I'm in agreement with that, but I do think it  
11:32:53 5 would be beneficial for everyone to exchange as much as we  
6 possibly can.

7 THE COURT: All right. Best efforts. But hard  
8 deadline by 1:00 a.m.

9 MS. HELM: Thank you, Your Honor.

11:33:05 10 THE COURT: I can't believe I really said that.

11 Next issue is Dr. Asch, which is on page 45 and 46.

12 I had indicated when I got to his deposition --  
13 actually his trial testimony late at night that I thought it  
14 was well-taken, but I realized later I hadn't even looked at  
11:33:30 15 Rule 804, I looked at only Rule 801. So I wanted to hear more  
16 on it today. And then defendants filed a brief on it last  
17 night about why Dr. Asch's previous trial testimony is usable  
18 in this trial. So I know what defendants' positions are on  
19 that issue.

11:33:51 20 Plaintiffs' counsel, do you want to respond?

21 MR. LOPEZ: Okay. I think I'm going to go through  
22 the elements, Your Honor, and deal with them one at a time.  
23 Let's deal with unavailability issue.

24 Obviously he is unavailable because he's outside of  
11:34:20 25 the subpoena power of the court. In fact, not even in this

11:34:24 1 country.

2 I want to talk about the reasonable means to procure  
3 attendance. When we first rendered this objection when  
4 counsel, defense, designated his trial testimony, we told them  
11:34:37 5 that we don't intend to call him live, but feel free to call  
6 Dr. Asch yourself, and I think we may have even provided the  
7 contact information for him. So they had -- they could have  
8 called him and procured his attendance here.

9 All they're saying is we didn't agree to produce him.  
11:34:54 10 He's not our expert. He's a fact witness. So I don't know  
11 what, really, efforts -- what reasonable means, maybe counsel  
12 for defense can address this, they made to see if Dr. Asch  
13 could actually be here.

14 For a number of reasons, we're going to play his  
11:35:11 15 deposition instead of calling him live. Some of it has to do  
16 with time factors and some of it has to do with the fact we're  
17 going to be more limited in what we present with him.

18 The other element here is the fact that this is being  
19 offered against a party who was not a predecessor in interest  
11:35:38 20 under the code. In other words -- I didn't say that right.

21 The prior depositions, those plaintiffs were not  
22 predecessors in interest of Mrs. Hyde. And counsel does cite  
23 two Ninth Circuit cases in the brief we got last night, but  
24 they're two district court cases, and both involve the same  
11:36:01 25 parties, I believe. The other was the use of an MDL

1 deposition applicable to cases filed after the depositions.  
2 That's something we had talked about, I think, in one of our  
3 first or second CMC's in this MDL. And those parties were  
4 allowed an opportunity to redepose.

5 So neither one of those things really apply here.

6 Here's the one I think we need to spend some time on,  
7 that's the opportunity and motive. I know it would seem that  
8 because the same plaintiffs' lawyers with the same device  
9 would have the same opportunity and motive, but, in fact,  
10 that's not true.

11 The results -- there were a number of evidentiary  
12 things, evidence with respect to NMT, some of the testing,  
13 bench testing, Dr. Asch's actions, interactions, with NMT that  
14 we simply did not bring up at trial that were not addressed in  
15 his deposition that we just didn't because we were counting  
16 minutes and wanted to make sure that -- the way we had the  
17 case mapped out, we had to leave some of that stuff on the  
18 cutting room floor.

19 This is Wisconsin law. We didn't know at that time  
20 whether or not Wisconsin law or Nevada law was going to apply  
21 in this case. But for certain it was not going to be Georgia  
22 law.

23 And the difference between Wisconsin law and Georgia  
24 law is quite significant from the standpoint we're dealing  
25 with a design defect statute here and the design defect

11:37:42 1 negligence per se and what the Court has left us and we don't  
2 have a failure to warn case.

3 Another piece of evidence we did not introduce  
4 through Dr. Asch were some of the flawed migration resistance  
11:37:58 5 testing. We're calling Dr. Parisian in this case. He's going  
6 to talk about some of this stuff. We didn't call Dr. Parisian  
7 in the last case because we didn't have time to. Now we will  
8 be able to do that.

9 There's Kay Fuller testimony and related exhibits.  
11:38:11 10 Failed bench testing compared to the SNF and SIR guidance  
11 article rebuttal that we could have put on through Dr. Asch  
12 that are going to become more relevant in this case.

13 The importance of monitoring outside of this  
14 retrievability study. That's a big issue here. As you know  
11:38:28 15 from some of the filings, even though we don't have a failure  
16 to warn case as relates to Dr. Henry, we're saying the company  
17 still had the obligation to tell the medical community for  
18 other doctors to maybe monitor this device to avoid what  
19 happened to Mrs. Hyde.

11:38:58 20 The deposition -- we took a deposition in this case,  
21 Your Honor, so both sides could deal with what the generic  
22 issues might be as they relate to Dr. Asch and his study.

23 Both sides had an equal opportunity to depose  
24 Dr. Asch, cross-examine Dr. Asch, on issues -- and I think  
11:39:17 25 with respect to the deposition, we're offering the deposition

11:39:20 1 as testimony.

2 That deposition -- the cross-examination for that  
3 deposition happened in the deposition. To allow now for  
4 additional testimony beyond deposition testimony that where  
11:39:36 5 there's no question, both sides had an opportunity to  
6 cross-examine, Mrs. Hyde is bound by that deposition because  
7 she was part of the MDL then. She should not be bound by any  
8 testimony or cross-examination that was given in a trial where  
9 she was not a party or that the party in which it was being  
11:39:53 10 rendered is not her predecessor in interest.

11 So that's the basis of us stating that this trial  
12 testimony should not be admitted into this case.

13 THE COURT: Let me ask you a couple of questions on  
14 your argument, Mr. Lopez.

11:40:11 15 You mentioned that because of time limits in the  
16 Jones trial you didn't go into things like bench testing and  
17 Kay Fuller --

18 MR. LOPEZ: Right.

19 THE COURT: -- testimony.

11:40:29 20 As I read Rule 804(b)(1)(B), in the -- you have a  
21 copy in front of you. In the phrase after the second dash, it  
22 says, talking about Ms. Hyde, had an opportunity and similar  
23 motive to develop it by direct, cross-, or redirect  
24 examination.

11:41:03 25 "It" refers back to testimony in 804(b) and it's the

11:41:10 1 testimony being presented.

2 So as I understand the rule, the question is whether  
3 the testimony that Bard would want to present through Dr. Asch  
4 was fully developed through direct, cross, or redirect. In  
11:41:30 5 other words whether you had an opportunity to address the  
6 points Bard wants now to present from that testimony.

7 I don't think it refers to matters that you may --  
8 different matters that you may have chosen to ask Dr. Asch  
9 about but didn't because of time limits.

11:41:48 10 The question is whether the excerpts they want to  
11 present to the jury from Dr. Asch, you had a fair opportunity  
12 to develop. And it seems to me you clearly did because you  
13 did redirect after Bard did its cross.

14 MR. LOPEZ: There's one area of the cross and  
11:42:05 15 redirect that we did not develop. I wasn't involved in that.  
16 I read the testimony, trial transcript pages 326 through 330.  
17 There was a sidebar where Mr. North had opened the door to  
18 asking Dr. Asch why he stopped the recovery -- stopped using  
19 the Recovery filter. You allowed Mr. O'Connor to get back up  
11:42:27 20 and redirect Dr. Asch about that, who had previously been  
21 admonished to not talk about the deaths he heard about, and  
22 therefore we never got that testimony from Dr. Asch in that  
23 trial.

24 THE COURT: Which testimony?

11:42:43 25 MR. LOPEZ: The testimony that you were going to

11:42:44 1 allow Dr. Asch to testify to before we could tell him, by the  
2 way, that admonition you got about not mentioning because you  
3 heard about deaths, you don't have to abide by that any more.

4 THE COURT: Hold on. I'm confused.

11:43:04 5 I thought we did abide by that. We did abide by an  
6 admonition on deaths. We're talking about the second trial,  
7 the Jones trial?

8 MR. LOPEZ: Right.

9 THE COURT: So say again --

11:43:23 10 MR. LOPEZ: Mr. North had asked a question of the  
11 witness that on sidebar, and, again, it's trial transcript 326  
12 through 330, had opened the door to now being able to ask  
13 questions of Dr. Asch about why he stopped using the Recovery,  
14 and his ability to now be able to testify was because of the  
11:43:45 15 deaths he heard about.

16 Well, he didn't know that admonition had been lifted  
17 and so we never got that testimony from Dr. Asch.

18 So I mean that's -- that's just an instance, one  
19 instance in the trial where we were not given a fair  
11:44:01 20 opportunity to cross-examine or redirect Dr. Asch on, really,  
21 a very significant issue in the case.

22 But I understand what Your Honor's saying. We had --  
23 we had opportunities to redirect on some of those issues that  
24 they're talking about. But those issues were also covered in  
11:44:22 25 a deposition. And I think the defense has to tell us where it



11:44:28 1 is, if those are different than the deposition, that we don't  
2 have to fight about, we don't have to worry about whether or  
3 not these exceptions under 804 and whether or not he's  
4 available, not available, or whether or not there's a  
11:44:41 5 predecessor in interest here.

6 And I think what we have here is that maybe he just  
7 likes the direct -- the cross he did better in the trial on  
8 the same issues.

9 But I just think in an MDL, in a matter of fairness  
11:45:01 10 to all the parties, we all agreed that this deposition of  
11 Dr. Asch was going to be the deposition, the generic fact  
12 deposition, that applied to all parties.

13 For us to go back and say what would we have done  
14 differently in anticipation of Wisconsin law, in anticipation  
11:45:19 15 of Nevada law, in anticipation of maybe having some more time  
16 in this case to have more fully developed the testimony  
17 surrounding what's being offered, I mean, I listed some.

18 And so I don't think you can just focus in on just  
19 the testimony they're offering. We have to focus in on  
11:45:42 20 whether or not as a pred- -- as a -- not as a predecessor in  
21 interest, but as the lawyers involved in that with the same  
22 motive and opportunity. Did we really have the same motive  
23 and opportunity? Because we weren't thinking about  
24 Mrs. Hyde's case. We weren't thinking about some of the  
11:46:00 25 unique aspects of her case where even one or two or three

11:46:03 1 questions that relate to that cross-examination might have  
2 been different. I don't know.

3 I mean I think that's the problem we have is that we  
4 could have and we didn't. We were not -- we did not have the  
11:46:13 5 same motive and opportunity in a case that involved a  
6 different product, involved a different injury, involved a  
7 different time period, and, frankly, a different set of  
8 evidence with respect to the issues here. And certainly not  
9 the same law.

11:46:33 10 THE COURT: Well, let me -- let me ask another  
11 question that's confusing me now.

12 I just looked back to the transcript that you  
13 submitted. It was from the Booker trial.

14 MR. LOPEZ: Okay. Someone put in my notes Jones  
11:46:47 15 trial, 326 to 330.

16 THE COURT: The transcript I have that's been  
17 submitted is from the Booker trial.

18 MS. HELM: Your Honor, we also over the weekend, the  
19 18 includes part of the Jones transcript as well.

11:47:00 20 THE COURT: Are you proposing to use what's from the  
21 Booker trial?

22 MS. HELM: Actually, Your Honor, we -- yes. Part of  
23 Booker and part of Jones. And we went back and made sure they  
24 didn't duplicate each other.

11:47:10 25 THE COURT: But am I to rule on everything, if I

11:47:13 1 decide Dr. Asch's testimony can be used, in the Booker  
2 transcript you gave me a week and a half ago?

3 MS. HELM: Yes, Your Honor.

4 THE COURT: Okay.

11:47:22 5 So what you're talking about, then, Mr. Lopez,  
6 concerns a new transcript from the Jones trial?

7 MR. LOPEZ: Yes. I was addressing the Jones -- I  
8 should have -- I thought the Court knew they designated both  
9 Booker and Jones.

11:47:37 10 THE COURT: Well, in Jones you weren't under a  
11 limit -- I'm sorry. In Booker you weren't under a limitation  
12 not to inquire of Dr. Asch's decision based on death evidence.  
13 That was in the trial.

14 MR. LOPEZ: That's true. That's true.

11:47:53 15 THE COURT: Okay.

16 MR. LOPEZ: Here's the other issue I have here.  
17 I'm -- the Ninth Circuit case is the one that really popped  
18 out at me. That was an MDL deposition that was taken --

19 THE COURT: What case are you referring to?

11:48:17 20 MR. LOPEZ: It's in the trial brief. Let's see.  
21 Page 2 of their trial brief. I apologize, Your Honor. We got  
22 this thing we -- we were doing a lot of other --

23 THE COURT: There's *Hangarter*, H-A-N-G-A-R-T-E-R,  
24 which is a 2004 Ninth Circuit case cited on page 2. And I  
11:48:57 25 think that's the only Ninth Circuit case on this point.

11:49:02 1 There's a later one dealing with Rule 32 which is the *Hub*  
2 case.

3 Well, go ahead and make your point.

4 MR. LOPEZ: That was a case where there was an MDL  
11:49:18 5 deposition that was taken. Certainly subsequent plaintiffs  
6 that come into that case involving the same law, same venue,  
7 same product, same liability case there would seem to be a  
8 pretty good argument of motive and opportunity there when  
9 someone becomes part of an MDL, but in that case I think the  
11:49:42 10 Court allowed a subsequent deposition, an opportunity to  
11 redepose after the MDL deposition because someone came on  
12 board afterwards.

13 I just -- the issue here, Your Honor, is do we really  
14 have a predecessor in interest here just because these  
11:50:00 15 happened to be the plaintiffs in the same -- among 4,000  
16 plaintiffs in an MDL and we're -- I mean, you're asking us to  
17 test whether or not we were thinking ahead, even if it's just  
18 one or two questions that might deal with that issue. That's  
19 why it's unfair.

11:50:21 20 I just ran through a list of things that we could  
21 have explored but didn't explore that may have gone to that  
22 issue, the issues that they want to present in their  
23 cross-examination of Dr. Asch. Which I will tell you they had  
24 a full opportunity to do at the deposition, which is -- should  
11:50:40 25 be the operative testimony in this case that both sides have

11:50:43 1 agreed would have in fact applied to Mrs. Hyde.

2 THE COURT: Okay. All right. Thanks.

3 MR. LOPEZ: The case is H-Y-N-I-X, page 2. The *Hynix*  
4 semiconductor case, Your Honor.

11:51:10 5 THE COURT: I don't -- I see. It's at the bottom.  
6 It's not a Ninth Circuit case, it's a Northern District of  
7 California case.

8 MR. LOPEZ: Yeah. They cited it.

9 THE COURT: Okay. Defense counsel.

11:51:27 10 MR. LOPEZ: I apologize. I shouldn't have said Ninth  
11 Circuit. My notes actually say district court. My notes  
12 actually say the Ninth Circuit really hasn't dealt with it.  
13 This was a district court case. I didn't want to misrepresent  
14 myself to the Court.

11:51:40 15 THE COURT: Okay.

16 MR. CONDO: Your Honor, good morning. James Condo on  
17 behalf of the defendants. My throat is a little raspy this  
18 morning. I apologize. I'm sucking a cough drop and I hope I  
19 can convey what I need to convey to the Court.

11:51:59 20 I wanted to start with the notion of the elements of  
21 the Rule 804(b)(1). I believe, as does Your Honor, that the  
22 literal language of the rule does in fact the analysis to  
23 focus on the specific testimony that is being offered and  
24 whether or not, in the context of that testimony factually,  
11:52:29 25 there was a motive and an opportunity to conduct redirect

11:52:35 1 examination in this case because the testimony designated  
2 comes from, in part, the cross-examination done by Mr. North  
3 in the Jones trial.

4           Theres was 13 pages of redirect examination in the  
11:52:50 5 Jones transcript done by Mr. O'Connor after Mr. North's  
6 cross-examination. That was the second time that Dr. Asch has  
7 testified on his involvement in the pilot study involving  
8 retrievability of the Recovery filter.

9           There are an identity of issues and there is exactly  
11:53:17 10 the same motive and opportunity that existed in Booker and in  
11 Jones to develop the very specific testimony that is now being  
12 proffered to the Court.

13           The notion that there needs to be an exact identity  
14 or privity in partners -- in parties, I think, is still an  
11:53:43 15 open question in the Ninth Circuit. The only case that we  
16 found was the *Hub* case, which talked about 32(a) in an earlier  
17 generation which had the successor in interest language. That  
18 language obviously no longer appears in the current version of  
19 32(a) with respect to depositions.

11:54:03 20           What appears in 804(b)(1), and is the language  
21 predecessor in interest.

22           The so the Court has not rejected -- the Ninth  
23 Circuit has not specifically rejected the notion that you need  
24 identity of parties. In fact, what they said was to the  
11:54:27 25 contrary, you don't need exactly identical parties and exactly

11:54:31 1 identical issues. And they left open the question as to  
2 whether or not an advocate, an versus party is sufficient in  
3 and of itself to establish that there was motive and  
4 opportunity to develop through cross-examination in that case  
11:54:52 5 the testimony.

6 Two later cases that we have found, only one dealing  
7 with 804(b)(1), is the *Hynix* case, the Northern District of  
8 California case, excuse me.

9 That case has, on page 250 FRD 452 page -- I'm sorry.  
11:55:25 10 250 FRD 452 2008, and I think the cite I'm reading from is 77  
11 Federal Rules of Evidence, Service 1, page 5. There is some  
12 language which I think is instructive talking specifically  
13 about the predecessor in interest language.

14 They acknowledge that the witness is unavailable and  
11:55:52 15 then the court goes on to state there that the modern test  
16 does not require privity between the current party and the  
17 party who participated in the prior proceeding. A previous  
18 party having like motive to develop the testimony about the  
19 same material facts is a predecessor in interest to the  
11:56:11 20 present party.

21 Privity is not the gravamen of Rule 804(b)(1).

22 And that same analysis appears in an opinion from  
23 Judge McNamee in this district. *Ernest Jackson versus ABC*  
24 *Nissan, Inc.*, also cited in our trial brief. 2007 Westlaw  
11:56:40 25 274315.

11:56:44 1 And there the court is taking up the issue of 32(a),  
2 the prior version before it was amended, that contained the  
3 successor in interest language. And the court, looking at  
4 *Hub*, quotes from *Hub* and says the requirements of 32(a) that  
11:57:07 5 the present lawsuits involve the same subject matter and same  
6 parties or their representatives or successors in interest  
7 have been construed liberally in light of the twin goals of  
8 fairness and efficiency. Then goes on to quote from *Hub* the  
9 accepted inquiry focuses on whether the prior  
11:57:26 10 cross-examination would satisfy a reasonable party who opposes  
11 admission.

12 And that's what we have here, Your Honor. We have 13  
13 pages of redirect examination on the very specific subjects  
14 that were raised by Mr. North in the Jones trial.

11:57:43 15 So we think that there is no Ninth Circuit authority  
16 that specifically precludes the utilization of the Jones  
17 testimony. We think the Ninth Circuit testimony -- authority  
18 that does exist certainly lays the conceptual framework for  
19 its admission by looking at the factual context in which it  
11:58:06 20 was presented and in which there was an opportunity to  
21 cross-examine or redirect the witness, the witness they have  
22 now presented twice.

23 I also think, Your Honor, that there is a more than  
24 colorful argument that the residual exception rule applies.  
11:58:30 25 Rule 807. It's not something we cited in our brief, but, as



1 Your Honor knows, the residual exception rule says that a  
2 hearsay statement is not excluded if it meets certain elements  
3 in 807.

4 It has to have the equivalent circumstantial  
5 guarantee of trustworthiness. I don't think there's any  
6 question that that has been demonstrated here. It's a  
7 testimony that occurred in this courtroom in front of Your  
8 Honor under oath involving qualified trial counsel on both  
9 sides.

10 Clearly the testimony that we are offering is offered  
11 as evidence of a material fact. And the testimony from Jones  
12 is more probative on the points for which it is offered than  
13 any other evidence that we could present.

14 And, finally, admitting it will best serve the  
15 purposes of the rules and the interest of justice, which I  
16 think is another coterminous way of saying that you construe  
17 the rules liberally in light of the twin goals of fairness and  
18 efficiency that the *Hub* court identified.

19 So we think, Your Honor, all of the elements of  
20 804(b)(1) have been met. The witness is outside the  
21 jurisdiction. He's not subject to subpoena power. We're not  
22 required to engage in a futile gesture in order to try to  
23 serve him with a subpoena in order to demonstrate that.

24 They are proffering him under 32(a) as an unavailable  
25 witness. Presumably he is as unavailable to us as he is to

12:00:21 1 them.

2 So all of the elements of 32(a)(4), which they are  
3 offering this witness under, I think make it clear that if he  
4 is unavailable to the plaintiffs, and they need to make the  
12:00:40 5 requisite showings that he is unavailable, then he is  
6 unavailable to us. They can't subpoena him. We can't  
7 subpoena him. They're not bringing him. We asked them to  
8 bring him.

9 He has been under their control and presented twice  
12:00:57 10 in this courtroom live in the first two trials. And we think  
11 if the elements of 32(a)(4) demonstrate unavailability to  
12 justify use of the deposition in this courtroom, then we have  
13 demonstrated unavailability as well as our efforts to simply  
14 acknowledging the fact that he is outside of the subpoena  
12:01:25 15 power of the court in a foreign country, a doctor with a  
16 medical practice.

17 THE COURT: What is your response, Mr. Condo, to  
18 Mr. Lopez's argument that you could have called him and asked  
19 him to come to trial and therefore had reasonable means to  
12:01:38 20 procure his attendance?

21 MR. CONDO: Well, Your Honor, I think that goes to  
22 the 32(a) element of what they are attempting to show. And  
23 under 32(a)(1)(C) the use has to be allowed by 32(a)(2)  
24 through (a)(8). And 32(a)(4) says that you can use the  
12:02:07 25 deposition for any party if the court finds, and then there is

12:02:11 1 a series of elements. And certainly he's not dead.

2 He is more than 100 miles from the place of trial or  
3 outside of the United States, unless it appears that the  
4 witness's absence was procured by the party offering the  
12:02:26 5 deposition.

6 They brought him twice.

7 His absence, we would submit, is procured by the  
8 party purporting to offer the deposition since they have not  
9 asked him to come.

12:02:39 10 If they have asked him to come and he can't be here,  
11 then our asking him to come to get the same answer's a futile  
12 gesture. But presumably, if they're proffering the  
13 deposition, they've asked him. He's come twice. And they  
14 have procured his absence and intend to offer the deposition.

12:03:01 15 THE COURT: Okay. Thanks.

16 Mr. Lopez, briefly, please.

17 MR. LOPEZ: Yes, Your Honor.

18 First of all, 32 deals with depositions. The issue  
19 is not a deposition here. It's 804 that requires reasonable  
12:03:24 20 means --

21 THE COURT: But -- but the point I think they're  
22 making is you can't use his deposition unless he's  
23 unavailable. So by offering his deposition you're saying he's  
24 unavailable. And yet you're arguing for their use he's not  
12:03:36 25 unavailable.

12:03:38 1 MR. LOPEZ: Because 804 requires reasonable means to  
2 procure his testimony. They're the ones that want to offer  
3 the testimony.

4 Your Honor, I think it's important for you to  
12:03:46 5 understand historically what happened here. We advised them a  
6 month before trial. More than a month before trial. We  
7 listed those new depositions that we would be submitting to  
8 you on August 22nd. We listed Dr. Asch as someone that we  
9 were not going to call live, that we were going to offer his  
12:04:04 10 deposition. So they knew. And they made designations  
11 themselves, affirmative designations with respect to Dr. Asch  
12 from his trial testimony. Not just in response to our  
13 offering his testimony. So I wanted to make that clear.

14 We don't control Dr. Asch. When his deposition was  
12:04:21 15 first taken in this case, he met with counsel for the defense  
16 before the deposition and counsel for the plaintiff before the  
17 deposition.

18 We have -- we don't control him any more than anyone  
19 else does. If he is available -- for them to say he's not  
12:04:36 20 available and not have taken any means or any steps to see  
21 whether or not Dr. Asch was willing to come to this trial for  
22 purposes of that testimony, you know, they haven't done that.

23 But there's one thing I think is important to  
24 emphasize. The operative testimony in this case is the  
12:04:56 25 deposition of Dr. Asch. And what they're now offering is

12:05:01 1 really cumulative evidence to that deposition. That is the  
2 testimony -- that is the MDL testimony in this case.

3 For the most part, and I haven't done a side-by-side  
4 comparison yet, but the testimony certainly is cumulative  
12:05:18 5 because they're asking questions about the same thing and a  
6 lot of those questions have been asked and answered in what  
7 you should consider the operative original testimony of  
8 Dr. Asch for all purposes in this MDL. Just something I  
9 thought of, Your Honor, with respect to this being cumulative  
12:05:37 10 and asked and answered.

11 Those are all the comments I have at this time.  
12 Thank you.

13 THE COURT: Okay. Thanks. We've gone way past an  
14 hour and a half on Tricia's court reporting, so we need to  
12:05:51 15 take a break.

16 MR. GOLDENBERG: Your Honor, could I just ask a  
17 favor? I have a 2:30 flight today. Are we going to be  
18 talking about jury instructions?

19 THE COURT: No.

12:06:07 20 MR. GOLDENBERG: Okay.

21 (The Court and the courtroom deputy confer.)

22 THE COURT: What I'd like to do is take a ten-minute  
23 break, come back and finish this so we can get you out of  
24 here. I don't know that we've got that much longer to go.  
12:06:26 25 But let's do that rather than take a lunch break now.

12:06:30 1 See you in ten minutes.

2 (Recess taken from 12:06 to 12:16.)

3 THE COURT: Thank you. Please be seated.

4 MS. HELM: Your Honor. I e-mailed the Kandarpa  
12:17:56 5 deposition --

6 THE COURT: I got it.

7 MS. HELM: Okay. I just wanted to make sure. Thank  
8 you.

9 THE COURT: Thanks.

12:18:02 10 Okay. If I do permit any portion of the Asch trial  
11 testimony to be presented, how do you propose to present it,  
12 defense counsel?

13 MR. CONDO: Your Honor, we would ask that it all be  
14 presented in written format question and answer with someone  
12:18:25 15 sitting on the stand reading the question and presenting the  
16 answer, as opposed to bifurcating it, some videotape, some  
17 read.

18 We think the videotape will unfairly engage the jury  
19 to the extent they'll tune out, so to speak, at the Q and A.  
12:18:52 20 We think there's about 70 percent of the deposition and  
21 designated testimony, because plaintiffs have designated their  
22 own Asch testimony if ours is permitted. We think when you  
23 take all of it together, it's about 70 percent of the  
24 designations in deposition and trial testimony are plaintiffs'  
12:19:10 25 and 30 percent are defendants'. We think with that

12:19:14 1 percentage, it's just fair to do it the old-fashioned way with  
2 someone reading the questions and someone playing the witness  
3 and reading the answers.

4 THE COURT: Are you talking about both the deposition  
12:19:25 5 and the trial?

6 MR. CONDO: Yes.

7 THE COURT: So you say you want to present the trial  
8 testimony by reading, but they should be precluded from  
9 playing the deposition testimony?

12:19:35 10 MR. CONDO: I'm asking the Court to exercise its  
11 discretion in order to, for basic fairness, have what they  
12 would otherwise play and what we would otherwise play, even  
13 with our counter designations, have it all read because there  
14 is no way, obviously, to play the trial testimony.

12:19:54 15 THE COURT: Okay. All right.

16 MR. LOPEZ: Obviously, we would object to that.  
17 First of all, the cross is attacking credibility. And as the  
18 Court knows, part of a witness's credibility is judged by his  
19 demeanor on the stand, the way they answer the question,  
12:20:10 20 things like that. We don't want to lose that aspect of this  
21 witness's testimony, especially if what they're offering is in  
22 fact impeachment or cross-examination.

23 I'm not sure about these percentages he's talking  
24 about. I really haven't had a chance, Your Honor, to look at  
12:20:26 25 what's cumulative, what's not cumulative. I got the Jones

12:20:30 1 deposition 11 days later than I thought I was going to get it.  
2 The trial testimony. I'm sorry, Jones trial testimony.

3 THE COURT: The only question --

4 MR. LOPEZ: There may not be that much that's  
12:20:41 5 different.

6 THE COURT: And I can't decide that. I don't have  
7 any information on that. But I take it from what you're  
8 saying, Mr. Lopez, your suggestion would be that if any of the  
9 trial testimony is allowed, it be read, and the deposition  
12:20:53 10 testimony be played.

11 MR. LOPEZ: Right. And we can orchestrate that. We  
12 can cooperate with counsel how to orchestrate that.  
13 Especially if there are some exhibits displayed on the video.  
14 We want those to be presented to the jury. Otherwise, we've  
12:21:07 15 got another layer of complication here.

16 THE COURT: Are you proposing, Mr. Lopez, that  
17 something be done by me to eliminate overlap between the  
18 deposition trial --

19 MR. LOPEZ: No. I don't think you should. I've  
12:21:28 20 asked counsel to do that, frankly. I don't want to have to do  
21 it either.

22 THE COURT: Okay. I don't know how I'm going to come  
23 out on the 804 question, but if I do allow some or all of the  
24 trial testimony, then I'll make a decision on reading versus  
12:21:42 25 playing based on what you all have said. I want to think



12:21:46 1 about that.

2 Okay. On page 46 of the final pretrial order,  
3 defendants ask that we follow the same practice in this trial  
4 that we did in the previous trials regarding defense experts  
12:22:02 5 who have been withdrawn. Namely, that plaintiffs not disclose  
6 the fact that they were experts originally retained by Bard  
7 and to avoid or stand by my rule that cumulative expert  
8 testimony shouldn't be permitted.

9 We also had the understanding there needed to be some  
12:22:29 10 showing that the point that would be made by these withdrawn  
11 experts is not available through other experts.

12 Is there an objection from plaintiffs on this  
13 procedure that we followed in the previous trials?

14 MR. LOPEZ: Well, I mean, just what we previously --  
12:22:42 15 we know how the Court's ruled. We have reasons to believe why  
16 they should be identified because of the admission on behalf  
17 of a party. But we're -- in this case we don't waive the  
18 objections previously made and our position on that, but we're  
19 willing to go --

12:23:16 20 I mean, Your Honor, I understand your position on it.  
21 You've stated it. There are other experts that are named  
22 experts, been deposed, and your ruling has been not to  
23 disclose them as defense experts to keep it neutral, as a  
24 condition to us being able to play the testimony. We disagree  
12:23:33 25 as we did in the past that we shouldn't be able to disclose

12:23:37 1 them, but we're not going to reurge that. Let's put it that  
2 way.

3 THE COURT: Okay. You've preserved the objection.

4 MR. LOPEZ: Yes.

12:23:45 5 THE COURT: But for purposes of trial, then, the same  
6 rules will apply. So we shouldn't disclose they were  
7 originally defense experts. And if you're going to use them,  
8 you ought to be able to make a showing you're eliciting  
9 opinion testimony from them that you're not getting from  
12:23:58 10 another expert so we're not having cumulative experts.

11 All right. On page 46, defendants ask whether  
12 Dr. Kessler or Dr. Parisian or both will be testifying at  
13 trial. Sounds like Dr. Parisian is intended. Are you going  
14 to call Dr. Kessler as well?

12:24:19 15 MR. LOPEZ: No. Dr. Parisian.

16 THE COURT: Okay. That answers that question.

17 Defense counsel, you raised in the final pretrial  
18 order on page 69 the issue of confidential documents. You  
19 say, as you did in prior trials, you raise the issue to  
12:25:04 20 preserve it. The problem we've run into from the prior  
21 trials, though, is there's a lot of case law that says once a  
22 deposition -- pardon me. Once an exhibit is used in open  
23 court any confidentiality is waived.

24 You don't address in here what you want to do with  
12:25:21 25 protective order documents that are going to be admitted into

12:25:24 1 evidence. What is your proposal on that?

2 MS. HELM: Thank you, Your Honor.

3 Also, do you want me to address the rule -- Local  
4 Rule 5.6 issue you also raised in your ruling on our motion  
12:25:37 5 for reconsideration?

6 THE COURT: I don't remember what that issue is.

7 MS. HELM: In your order on the motion for  
8 reconsideration you said to the extent an exhibit will be  
9 published or discussed during trial and a party believes the  
12:25:57 10 exhibit is confidential and should be protected from public  
11 disclosure, it seems the procedures set forth in Local Rule  
12 5.6 should apply. And then asked us to address it today.

13 THE COURT: I think all I meant by that was that  
14 before it's used there needs to be a showing under Ninth  
12:26:14 15 Circuit law, which I think would be a compelling need  
16 requirement that the document should be kept confidential. I  
17 don't mean you need to go down and lodge something in the  
18 clerk's office before you try proposing it.

19 MS. HELM: Thank you, Your Honor.

12:26:32 20 We are not -- as a preface, as we did as in Booker  
21 and as in Jones, we are not asking the Court to seal the  
22 courtroom. And in most instances, and we have not yet asked  
23 that the transcript be sealed.

24 What has happened, though, is in this -- in Booker  
12:26:51 25 and in Jones many, many exhibits were admitted, simply

12:26:55 1 admitted into evidence, and, frankly, they were never  
2 discussed. Or they were admitted into evidence and they were  
3 simply identified as was this X document.

4 The documents that were discussed, most of them were  
12:27:12 5 only discussed in part. And so you might have a 500-page  
6 document and four paragraphs were discussed.

7 We don't believe, in light of the procedures that are  
8 in the courtroom, the fact that the exhibits are maintained,  
9 only go to the jury and then they're gone, that the full  
12:27:29 10 extent of the documents have been published in open court.

11 And we would like the opportunity to address, after the close  
12 of the trial, the portions of either the exhibits that were  
13 simply just identified and never addressed, because there were  
14 many, many of those. For example, in Jones we admitted pages  
12:27:53 15 of exhibits and then never discussed them. Or the portions of  
16 exhibits that were discussed -- that were not discussed.

17 And I -- we understand our burden under Ninth Circuit  
18 law as far as sealing. I'm not sure those -- I mean, I'm not  
19 going to argue with the Court that that is not the proper  
12:28:13 20 burden, and I understand the Court's position on that, but we  
21 should be given the opportunity to address the exhibits that  
22 were not discussed or exhibits that were only partially  
23 published in the open courtroom. And that's what we're asking  
24 for.

12:28:26 25 We're asking for the ability, after the trial, to go

12:28:29 1 back, and it's a very tedious process, and look at exhibits  
2 that were not admitted in Booker and that fall into those two  
3 categories and to present you with evidence to try to meet the  
4 compelling interest standard to seal those exhibits.

12:28:46 5 So I think that's -- the procedure is the same as  
6 we're asking for, but I'm hoping I'm clarifying it a little  
7 bit.

8 THE COURT: Well, as I understand you, Ms. Helm, you  
9 are saying that we will handle exhibits that the jury sees and  
12:29:01 10 that get discussed in this trial the same way we did in the  
11 previous trials; we won't be clearing the courtroom when we  
12 get to a confidential exhibit. What you want is the ability  
13 to argue after the close of trial that an exhibit that was  
14 admitted but not shown to the jury, or was admitted and only  
12:29:23 15 shown in part to the jury, retains its confidentiality in some  
16 degree.

17 MS. HELM: Yes, Your Honor.

18 THE COURT: Is that correct?

19 MS. HELM: Yes, Your Honor.

12:29:33 20 THE COURT: So you're not proposing any trial  
21 procedure, just the opportunity to make that argument after  
22 trial.

23 MS. HELM: Yes, Your Honor. And the finding that we  
24 have not waived that position --

12:29:41 25 THE COURT: Waived the argument.

12:29:43 1 MS. HELM: Waived the argument. Exactly, Your Honor.

2 THE COURT: That's not the same as saying you haven't  
3 waived the confidentiality. That's the issue I'm going to  
4 have to decide.

12:29:52 5 MS. HELM: Yes, Your Honor.

6 THE COURT: Okay.

7 MS. SMITH: And plaintiffs' position remains the same  
8 as we've argued in most of our briefing, is that when these  
9 exhibits are admitted into evidence, they then become public  
12:30:04 10 record.

11 THE COURT: And that position isn't being decided by  
12 what Ms. Helm said; right? That would be the issue we would  
13 address at the end of trial, which was whether you're right  
14 about that or whether they're right that by not publishing it  
12:30:17 15 or by publishing only a portion, they retain confidentiality.

16 MS. SMITH: Right.

17 THE COURT: Okay. I'm fine with that. We won't  
18 adopt any special procedures in trial. Defendants are not  
19 waiving their ability to make that argument. But I'm not  
12:30:31 20 deciding whether or not admission by itself is or is not a  
21 waiver of confidentiality. That will be the issue we'll  
22 address.

23 MS. HELM: Your Honor, you asked me on Thursday to  
24 remind you about the motion for extension on the Jones  
12:30:48 25 exhibits.

12:30:49 1 THE COURT: Right.

2 MS. HELM: And my proposal would be that we address

3 both Jones and Hyde after the Hyde trial so that we're not

4 trying to brief it during the Hyde trial. Many of the

12:31:05 5 exhibits will be the same. And the issues, I believe, are

6 identical.

7 THE COURT: Any objection to dealing with Jones and

8 Hyde at the same time?

9 MS. SMITH: No objection.

12:31:19 10 THE COURT: Do you have a proposed date, Ms. Helm?

11 MS. HELM: 21 days after the Hyde verdict.

12 THE COURT: Okay. Just a second.

13 Just so that we're clear, let's say that October 26th

14 will be the date. That's 21 days after October 5th.

12:32:02 15 October 26th will be the date for addressing this

16 issue with respect to both the Jones and the Hyde trials.

17 MS. HELM: Thank you.

18 THE COURT: So I will grant the motion which is at

19 Docket 12440 and set the date of October 26th to have those

12:32:24 20 issues addressed.

21 Okay. Those were the only issues I had from the

22 final pretrial order.

23 Is there anything else any of you want to raise

24 that's in the final pretrial order? There's some other things

12:32:41 25 I want to talk about from the trial briefs.

12:32:45 1 MS. REED ZAIC: I have a red-lining malfunction I  
2 need to point out and correct with the pretrial order.

3 Daniel Orms and Patrick McDonald are witnesses that  
4 should be on our witness list. They've been in the pretrial  
12:32:57 5 order and our witness list on previous trials and we've  
6 submitted deposition designations now for the third time, and  
7 I realize that when I -- at some point when I was red-lining  
8 the document, I deleted them from our list of witnesses.  
9 They're on the defendants' list. But I just wanted to make  
12:33:10 10 that correction.

11 THE COURT: So --

12 MS. HELM: Your Honor, we have no objection. They're  
13 known witnesses and they're actually identified on the defense  
14 witness list.

12:33:24 15 THE COURT: That's fine.

16 So I will add, then, to the plaintiffs witnesses --  
17 who is it? Daniel Orms --

18 MS. REED ZAIC: Daniel Orms, O-R-M-S, and Patrick  
19 McDonald, M-C-D-O-N-A-L-D.

12:33:38 20 THE COURT: Okay. Those will be added to the  
21 plaintiffs' witness list that begins on page 23.

22 Ms. Helm, do you have something regarding the final  
23 pretrial order?

24 MS. HELM: Yes, Your Honor. We have an objection to  
12:33:58 25 a witness identified on plaintiffs' exhibit list, page 26.



12:34:01 1 Ms. Charis Campbell. She was not identified in discovery  
2 responses as a witness with knowledge, has not been  
3 identified, and the first time she's been identified by the  
4 plaintiffs as a witness in this case is in the pretrial order.  
12:34:19 5 So we have an objection to her on the basis of nondisclosure.

6 MR. LOPEZ: Your Honor, she is identified on BBA  
7 documents and Bard documents as a Bard employee regarding  
8 Dr. Kandarpa. We have no intentions on calling her, but we  
9 would like to reserve the right to show good cause should that  
12:34:44 10 arise to offer her at the time of trial. And we will not  
11 offer her or try to proffer her testimony without having  
12 brought that to the Court's attention.

13 THE COURT: All right. So the objection is on the  
14 record. I may not have to decide it if you don't call her.  
12:34:58 15 If you decide to call her, I'll be happy to address the  
16 nondisclosure issue.

17 MR. LOPEZ: Thank you, Your Honor.

18 THE COURT: I'll note in my copy of the pretrial  
19 order that the defendants have a nondisclosure objection to  
12:35:11 20 Ms. Campbell.

21 Anything else on the final pretrial order?

22 MS. HELM: I don't have the page, Your Honor, but  
23 I'll find it. But we have reached an agreement that if your  
24 prior ruling on Recovery migration death applies in the Hyde  
12:35:31 25 case, that the redactions to exhibits that we agreed to and

12:35:36 1 finally accomplished in the Jones case will apply. So we will  
2 be using the as-redacted exhibits from Jones and only have to  
3 redact new exhibits. Hopefully that will keep us from keeping  
4 Traci here late the night before. And we've also agree to  
12:35:54 5 work on those redactions both -- if it applies, both after we  
6 get your ruling and throughout trial so the documents will be  
7 redacted well in advance of them being submitted to the jury.

8 THE COURT: Okay.

9 Anything else on the final pretrial order?

12:36:24 10 MR. O'CONNOR: I don't think we have anything else on  
11 the pretrial order.

12 THE COURT: Okay.

13 With these modifications we've discussed, I'm going  
14 to adopt the final pretrial order at Docket 12388 as the final  
12:36:39 15 pretrial order in the case. That means this is the blueprint  
16 for the trial and Rule 16(e) will apply from this point on,  
17 meaning that any changes to the final pretrial order will  
18 require compliance with the standard in Rule 16(e), which is  
19 to avoid manifest injustice.

12:37:07 20 Let's talk for a minute about the trial brief.

21 The defendants argued at pages 12 and 13 of their  
22 trial brief that the presumption in Wisconsin statute  
23 895.047(3)(b) should apply in this case, and defense counsel  
24 cited a new case that wasn't -- that was the *Kilty* case,  
12:37:52 25 K-I-L-T-Y, that wasn't available when I issued the summary

12:37:56 1 judgment ruling that said the presumption would not apply.

2 And I've read the *Kilty* case. The -- well, I  
3 shouldn't say I've read it. I've read what I think are the  
4 relevant portions. I didn't read the whole thing.

12:38:19 5 What was unclear to me was Bard states on page 13,  
6 "Bard submits that this question warrants more detailed  
7 briefing."

8 What are you thinking we need to do on this issue?

9 MR. ROGERS: Well, Your Honor, I don't have an answer  
12:38:39 10 to that and I'm surprised we said that. I think we pretty  
11 much said our piece regarding the issue in the trial brief.  
12 And, obviously, if the Court wanted more briefing we'd be glad  
13 to do it, but I don't think we have anything else we need to  
14 tell you.

12:38:51 15 THE COURT: Well, let me ask you a question,  
16 Mr. Rogers, about the *Kilty* case, which was a decision in June  
17 of this year from the Western District of Wisconsin that was  
18 dealing with this portion of the statute.

19 The product at issue in *Kilty* was a respirator to  
12:39:15 20 protect workers from asbestos when they were presumably  
21 remediating asbestos contamination. The National Institute of  
22 Occupational Safety and Health and Bureau of Mines had enacted  
23 regulations that, according to the district court, concerned  
24 the, quote, performance and quality of respirator equipment,  
12:39:43 25 close quote. And I'm reading from page 2 of the Westlaw

12:39:47 1 version.

2 The regulations themselves say that respirators are,  
3 quote, approved after meeting the minimum requirements for  
4 performance and respiratory protection prescribed in this  
12:40:09 5 part, close quote.

6 And then if a respirator satisfied those  
7 requirements, they actually issued a certificate saying this  
8 is a certified respirator.

9 Here's the question I have. It seems to me this  
12:40:27 10 regulation that was being addressed in *Kilty* was a direct  
11 regulation of a product for purposes of safety and health. It  
12 was the agency saying these are the minimum requirements you  
13 have to meet for respiratory protection for people involved in  
14 asbestos. And without a great deal of discussion the district  
12:40:53 15 court said that where regulations comply -- require specific  
16 compliance with regulations and the agency issues a  
17 certification, then the presumption under Wisconsin applies.  
18 Under Wisconsin law applies.

19 In my summary judgment ruling, I cited two decisions,  
12:41:17 20 as you know, from West Virginia, I think, which applied the  
21 same section and said 510(k) is not a safety determination and  
22 therefore doesn't invoke the presumption.

23 It seems to me that the regulation we're dealing with  
24 in *Kilty* is a direct regulation of a product to preserve  
12:41:39 25 safety. And the 510(k) isn't that kind of program.

12:41:44 1 So when I read *Kilty*, my thought was this really  
2 doesn't address the 510(k) issue that was decided by those  
3 other cases. But I'm interested in the response you have on  
4 that issue.

12:41:57 5 MR. ROGERS: Your Honor, I do not disagree with you  
6 that the reg that was at issue in the *Kilty* case was a safety  
7 regulation, and we note that in a footnote that that was  
8 likely the case.

9 But I think the difference we wanted to draw the  
12:42:10 10 Court's attention to was in the West Virginia cases they  
11 grafted this notion of safety into the statute. Into the  
12 Wisconsin pipe liability statute. And that word does not  
13 appear in the statute, and the *Kilty* case does not ever say  
14 that the reg at issue needs to be a safety regulation in order  
12:42:36 15 for the presumption under the statute to become applicable.

16 And so, Your Honor, I don't disagree with you that  
17 they were dealing with a safety statute, but the court  
18 certainly never said in the *Kilty* case that we can only use  
19 this reg as a basis for the application of the statute because  
12:42:54 20 it is a safety regulation. So that's just not present in the  
21 language of the statute and I just don't think that it's  
22 there.

23 THE COURT: Well, I understand that point. Let me  
24 tell you the hypothetical that I've been thinking about on  
12:43:10 25 this issue.

12:43:12 1 Let's take an automobile which must comply with  
2 certain emissions regulations, certain miles per gallon under  
3 federal law, that rolls over and injures somebody.

4 Could a party under this Wisconsin statute say  
12:43:30 5 because this automobile complied with emissions regulations  
6 there is a presumption that there is no safety defect that  
7 caused the rollover?

8 MR. ROGERS: That's a tough hypothetical, Your Honor,  
9 I agree.

12:43:49 10 You know, and I think that the 510(k) process,  
11 similar to the reg at issue in *Kilty*, does require the  
12 regulator to certify or clear, whatever the actual words are  
13 that would be applicable, whatever the product was.

14 And so here we've got a product that did go through  
12:44:08 15 the regulator's process and the regulator decided that the  
16 product could be sold. And, again, Your Honor, I think that  
17 that scenario with the 510(k) process is much closer to the  
18 *Kilty* scenario than the emissions scenario that you just gave  
19 me.

12:44:25 20 THE COURT: But the argument you made seems to  
21 concede that there has to be some health and safety component  
22 to the Wisconsin statute.

23 MR. ROGERS: Your Honor, listen, I can't find a way  
24 out of your emissions scenario, so I -- I would think there  
12:44:42 25 needs to be some logical nexus between whatever the regulation

12:44:46 1 is and the presumption. I mean that only makes logical sense.  
2 But, again, *Kilty* does not require the underlying bases to be  
3 a safety statute.

4 THE COURT: Okay. All right. Thanks.

12:45:03 5 Do plaintiffs have arguments on this?

6 MS. REED ZAIC: Your Honor, I agree with everything  
7 you said. I would just point out the *Kilty* court likely did  
8 not need to point out any aspect of safety because it was a  
9 safety statute. Those particular statutes are safety  
12:45:17 10 regulations.

11 And another point of -- to discern between the 510(k)  
12 process and the regulations under 30 CFR 11.2 is that in order  
13 to get the certification, they have to be in compliance with  
14 standards issued by a government agency. The agency sets  
12:45:36 15 them. We don't have them in the 510(k) process, as we covered  
16 last year in preemption. There's no parallel regulation  
17 setting specific specifications for an IVC filter. That is  
18 the case with regard to respirators that oversee and control  
19 performance and emission -- a particular emissions level.

12:45:56 20 So, first of all, there has to be compliance with a  
21 particular government standard that has been developed,  
22 published, issued. And once that certification is obtained by  
23 the manufacturer of the respirator, there is a process of  
24 recertification.

12:46:14 25 So the certificate is issued and I believe annually

12:46:16 1 they have to go back and get it recertified. These particular  
2 respirators. That is certainly not the case with an IVC  
3 filter.

4 THE COURT: Okay. Thanks.

12:46:28 5 What I will do is I will address this in an order  
6 that comes out next week.

7 I've got to address this, we've got to address  
8 Dr. Asch, we've got to address the negligence per se issue.  
9 So we'll probably do one order that covers all of those.

12:47:01 10 Two housekeeping matters. Are you all invoking the  
11 rule of exclusion in this trial?

12 MR. ROGERS: Consistent with the prior two trials, I  
13 think we would, except for experts, which is the world we  
14 lived in under both Booker and Jones.

12:47:20 15 MR. O'CONNOR: We're going to live with the prior  
16 rule.

17 THE COURT: Okay. So the rule is invoked. I'll  
18 leave it to you to tell fact witnesses it's in play and what  
19 it means. But experts can sit in on testimony of other  
12:47:31 20 experts.

21 Last point, which I always try to remind counsel of,  
22 please remember in your openings not to venture into argument  
23 just so that I don't have to interrupt you.

24 What other matters do Plaintiffs' counsel need to  
12:47:47 25 raise?



12:47:48 1 MR. O'CONNOR: I don't think we have anything. We  
2 don't have anything further, Your Honor.

3 MR. NORTH: Your Honor, just one thing. Couple of  
4 weeks ago the plaintiffs filed a report to the Court regarding  
12:47:58 5 the Simon Nitinol cases, and we would like to, the defense,  
6 submit something ourselves. We're a little concerned about  
7 the proposal of 38 of those cases being remanded to various  
8 district courts.

9 We understand the Court's belief, and I think the  
12:48:15 10 Court's absolutely correct that permanent filters were not  
11 part of the original MDL. But we've been talking with our  
12 client about a couple of ideas, so we'd like to file  
13 something, if we could, two weeks from tomorrow concerning  
14 Simon Nitinol.

12:48:31 15 THE COURT: Yeah, that's fine. I haven't even read  
16 what plaintiff submitted. I will not have time between now  
17 and trial, so you can certainly file something else.

18 Did you want to say something on that?

19 MR. LOPEZ: No, Your Honor. I'm fine with that.

12:48:43 20 THE COURT: Anything else from the defense?

21 MR. ROGERS: No, Your Honor.

22 MR. LOPEZ: This is -- as the Court knows, there are  
23 other case, trials going, that have been set for trial.  
24 There's one in Arizona, one -- there's different parts of the  
12:48:54 25 country.

12:48:56 1 I know it's our obligation and I know it's been that  
2 way in other MDL's to keep -- even though they aren't federal  
3 court cases, it's in the interest of the MDL and certainly the  
4 MDL judge for us to keep you apprised of what's going on  
12:49:09 5 outside of what's happening here.

6 I want to -- I bring that up because I need you to  
7 know there have been a number of cases that are ready to go to  
8 trial, the cases have resolved. Those are confidentiality  
9 issues. It may be something we have to address some day.  
12:49:29 10 Maybe soon. Maybe after this trial. And how much detail you  
11 want about that. Every judge is different about that, Your  
12 Honor, it's been my experience. Some want to know exactly  
13 what's going on in every case with respect to settlements  
14 outside of the MDL.

12:49:47 15 THE COURT: I'm not one of those judges.

16 MR. LOPEZ: Okay. I wanted to find that out.

17 THE COURT: Those aren't my cases; I'm not  
18 responsible for them. As you've been able to tell, I don't  
19 believe in wading into your settlement talks in this case.

12:50:07 20 Obviously, if there's a trial's going in another  
21 case, going to actually be in front of a jury, I'd be  
22 interested in knowing the trial's going and I'd be interested  
23 to know what happens because that may affect what we do with  
24 bellwether decisions down the road or other issues. But I  
12:50:19 25 don't feel the need to know terms of settlement in those other

12:50:22 1 cases.

2 MR. LOPEZ: I just wanted to make sure about that.

3 The other issue are these early remands or the mature  
4 cases, whatever we've been talking. I'm getting -- it's not  
12:50:33 5 like people are calling everyday but --

6 THE COURT: Did you see the order on that?

7 Did we get that order out?

8 Oh. Okay.

9 We've got an order done. I thought it had gone out  
12:50:45 10 in the last day or two. It will go out in the next day or  
11 two.

12 MR. LOPEZ: Oh. Okay, Your Honor.

13 THE COURT: It's 38 pages long. It takes everything  
14 you've submitted and tries to provide enough information for  
12:50:55 15 the other judges to know what happened here. So that order  
16 will get out.

17 MR. LOPEZ: Okay. Thanks, Your Honor.

18 THE COURT: Okay. We'll see you at 8:30 on the 18th.

19 EVERYBODY: Thank you, Your Honor.

12:51:11 20 (End of transcript.)

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C E R T I F I C A T E

I, PATRICIA LYONS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 8th day of September, 2018.

s/ Patricia Lyons, RMR, CRR  
Official Court Reporter